Supreme Court, U.S.
FILED
NOV 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

(17)

No. 84-1529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, Secretary
of Health and Human Services,
Petitioner,

v.

AMERICAN HOSPITAL ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF FOR THE RESPONDENTS AMERICAN HOSPITAL ASSOCIATION, *ET AL.*

Of Counsel:

RICHARD L. EPSTEIN
ROBERT W. MCCANN
MARY L. AHERN
American Hospital
Association
840 N. Lake Shore Drive
Chicago, IL 60611

STUART M. GERSON
(*Counsel of Record*)
WILLIAM G. KOPIT
DAVID H. LARRY
1140 19th Street, N.W., Suite 900
Washington, D.C. 20036
(202) 861-0900
EPSTEIN BECKER BORSODY
& GREEN, P.C.

Attorneys for the Respondents
American Hospital Association, et al.

Nov. 4, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, in the absence of a clear statement of congressional intent, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, may be implied to authorize federal intervention in medical treatment decisions made concerning seriously-ill infants.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
STATEMENT	2
A. Introduction	2
B. The Judgment Before This Court	2
C. Factual and Legal Background of the Instant Case	4
1. The genesis of the regulatory effort	4
2. The effect of the rule in hospitals	6
3. Initial litigation and petitioner's response	10
D. The Child Abuse Amendments Of 1984	11
SUMMARY OF ARGUMENT	13
ARGUMENT	16
I. Congress Did Not Intend That Section 504 Of The Rehabilitation Act Of 1973 Would Authorize The Federal Government To Intervene In Medical Decision-making Concerning Seriously-ill Newborn Infants	16
A. The Plain Meaning of Section 504 Does Not Provide Authority for Petitioner's Attempts To Regulate Hospitals Through Intervention in the Medical Treatment of Seriously-ill Infants	16
1. Infants with birth defects are not "otherwise qualified handicapped individuals" within the meaning the statute	17

TABLE OF CONTENTS continued

Page

2. Given the plain meaning of the statute petitioner can identify no federally-financed program or activity affecting medical treatment decisions from which hospitals could be shown to be discriminating against seriously-ill infants 20

a. Medicare and Medicaid do not constitute federal financial assistance 21

b. Medicare does not involve the treatment of newborns, and its specific terms prohibit governmental interference in the treatment that it does involve 23

c. Medicaid is not an appropriate link to the federal regulation of hospitals 24

3. Medical treatment decision-making cannot constitute discrimination by hospitals within the plain meaning of section 504 25

a. Hospitals do not make treatment decisions. 26

b. Medical treatment decisions cannot constitute discrimination, denial or exclusion within the meaning of section 504 28

B. Because The Legislative History Of Section 504 Is Concerned Entirely With Programs Of Education, Vocational Training and Independent Living, And Contains No Indication That Medical Treatment Decisions Were To Be Addressed, That Legislative History Provides No Basis Of Authorization For The Federal Government To Regulate The Medical Treatment Of Seriously-Ill Infants 32

1. The Humphrey/Percy/Vanik proposal to amend Title VI 34

2. The Rehabilitation Act of 1973 37

3. Rehabilitation Act Amendments of 1974 38

TABLE OF CONTENTS continued

Page

4. Rehabilitation, Comprehensive Services and Developmental Disabilities Act Of 1978 (1978 Amendments To Rehabilitation Act) 39

C. DHHS' Current Interpretation Of Section 504 Should Be Accorded No Deference In Evaluating The Statute And Its History Because The Agency's View Is Neither Long Nor Consistently Held 40

II. In The Absence Of Any Clear Statement Of Congressional Intent, Congress Cannot Be Presumed To Have Superseded The Traditional Role Of The States In Dealing With Child Protection And Medical Treatment 42

A. The Federal Government Lacks Authority Under Section 504 To Supresede the Traditional Role Of The States In Dealing With The Medical Treatment Of Seriously-Ill Infants 42

B. In The Child Abuse Amendments, Congress Built Upon Existing State Protective Mechanisms In Order To Reaffirm Both The Rights Of Seriously-Ill Infants And The Need To Avoid Unreasonable Governmental Intervention Into Parental Responsibilities And The Practice Of Medicine 45

C. There Is No Need For Federal Involvement In Medical Treatment Decision-Making Concerning Seriously-Ill Infants 48

CONCLUSION 49

APPENDIX:

State Statutory Provisions Requiring Reporting Of Suspected Child Abuse Or Neglect 1a

State Statutory Provisions Including Failure To Provide Medical Care Within Prohibition Of Child Abuse Or Neglect 3a

TABLE OF AUTHORITIES

CASES: Page

Alexander v. *Choate*, —— U.S. ——, 105 S. Ct. 712 (1985) ..... *passim*

American Academy of Pediatrics v. *Heckler*, 551 F. Supp. 395 (D.D.C. 1983) ..... *passim*

American Hospital Association v. *Heckler*, 83 Civ. 2638 (CLB) (SDNY April 6, 1983), *aff'd*, Nos. 84-6211, 6213 (2d Cir. Dec. 27, 1984) 2, 4, 10

American Tobacco Co. v. *Patterson*, 456 U.S. 63 (1982). 17

Apex Hosiery Co. v. *Leader*, 310 U.S. 469 (1940) ... 42

Bradley v. *State*, 79 Fla. 651, 84 So. 677 (1920) 45

Brooklyn Hospital, In re, 45 Misc. 2d 914, 258 N.Y.S. 2d 621 (N.Y. Sup. Ct. 1965) 44

Caminetti v. *United States*, 242 U.S. 470 (1917) 17

Cherry v. *Mathews*, 419 F. Supp. 922 (D.D.C. 1976) .. 4

Cicero, In re, 101 Misc. 2d 699, 421 N.Y.S.2d 965 (N.Y. Sup. Ct. 1965) 44

Clark, In re, 185 N.E.2d 128 (Ohio 1962) 44

Commonwealth v. *Edelin*, 371 Mass. 497, 359 N.E.2d 4 (1976) 45

Consolidated Rail Corp. v. *Darrone*, —— U.S. ——, 104 S. Ct. 1248 (1984) 20, 21, 40

Cook v. *Budget Rent-A-Car Corp.*, 502 F. Supp. 494 (S.D.N.Y. 1980) 22

Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053 (1978) 44

Department of Transportation v. *Paralyzed Veterans of America*, 752 F.2d 694 (D.C. Cir. 1985), *cert. granted*, 54 U.S.L.W. 3262 (U.S. Oct. 22, 1985).. 22, 23

Doe v. *Colautti*, 454 F. Supp. 621 (E.D. Pa. 1978), *aff'd*, 592 F.2d 704 (3d Cir. 1979) 32

TABLE OF AUTHORITIES continued

Page

Doe v. *New York University*, 666 F.2d 761 (2d Cir. 1981) 19

Doe v. *Region 13 Mental Health-Retardation Commission*, 704 F.2d 1402 (5th Cir. 1983) 22

Duquette by and Through Duquette v. *Dupuis*, 582 F. Supp. 1365 (D.N.H.) 32

Eaglen v. *State*, 249 Ind. 144, 231 N.E.2d 147 (1967) .. 45

FTC v. *Bunte Bros., Inc.*, 312 U.S. 349 (1941) 43

Grove City College v. *Bell*, —— U.S. ——, 104 S. Ct. 1211 (1984) 20, 22

Hudson, In re, 13 Wash. 2d 673, 126 P.2d 765 (1942) . 44

Interest of M. W., In re, 217 Neb. 325, 348 N.W.2d 861 (1984) 45

Interest of R. W. B., In re, 241 N.W.2d 546 (N.D. 1976) 45

Ivey, In re, 319 So. 2d 53 (Fla. Dist. Ct. App. 1975) .. 44

Jefferson v. *Griffin Spalding County Hospital Authority*, 247 Ga. 86, 274 S.E.2d 457 (1981) 44

Jones v. *Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376 (11th Cir. 1982), *cert. denied*, 104 S. Ct. 1591 (1984) 22

Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) 43

Katharine Gibbs School, Inc. v. *FTC*, 612 F.2d 658 (2d Cir. 1979) 43

Lunceford v. *District of Columbia Board of Education*, 745 F.2d 1577 (D.C. Cir. 1984) 32

Matthews v. *State*, 240 Miss. 189, 126 So. 2d 245 (1961) 45

Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976) .. 27

Morton v. *Ruiz*, 415 U.S. 199 (1974) 40, 41

TABLE OF AUTHORITIES continued

Page

North Haven Board of Education v. *Bell*, 456 U.S. 512 (1982) 20

Palmer v. *Commonwealth of Massachusetts*, 308 U.S. 79 (1939) 43

Parham v. *J. R.*, 442 U.S. 584 (1979) 27

Pennhurst State School and Hospital v. *Halderman*, 451 U.S. 1 (1981) 25

People ex rel. Wallace v. *Labrenz*, 411 Ill. 618, 104 N.E. 2d 769 (1952), *cert. denied*, 344 U.S. 834 (1952) .. 44

Phillip B., In re, 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (1979), *cert. denied*, 455 U.S. 949 (1980) 44

Plummer by Plummer v. *Branstad*, 731 F.2d 574 (8th Cir. 1984) 32

Prince v. *Commonwealth of Massachusetts*, 321 U.S. 158 (1984) 44

P.V.W., In re, 424 So. 2d 1015 (La. 1982) 44

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) . 43

Sampson, In re, 65 Misc. 2d 658, 317 N.Y.S.2d 641 (N.Y. Fam. Ct. 1970) 44

Simpkins v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964) 32, 33

Southeastern Community College v. *Davis*, 442 U.S. 397 (1979) ..... *passim*

State v. *Clark*, 5 Conn. Cir. Ct. 699, 261 A.2d 294 (1969) 45

State v. *Stehr*, 92 Neb. 755, 139 N.W. 676 (1913), *aff'd on rehearing*, 94 Neb. 151, 142 N.W. 670 (1913) .. 45

State v. *Staples*, 126 Minn. 396, 148 N.W. 283 (1914) .. 45

Trafficante v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) 41

TABLE OF AUTHORITIES continued

Page

United States v. *Bass*, 404 U.S. 336 (1971) 43

United States v. *Baylor University Medical Center*, 736 F.2d 1039 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 958 (1985) 21, 22

United States v. *Erika*, 456 U.S. 201 (1982) 31

United States v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975) 40

United States v. *University Hospital of the State University of New York at Stony Brook*, 729 F.2d 144 (2d Cir. 1984), *affirming* 575 F. Supp. 607 (E.D.N.Y. 1983) ..... *passim*

Wright v. *DeWitt School District*, 238 Ark. 906, 385 S.W. 2d 688 (1965) 44

STATUTES AND REGULATIONS:

Administrative Procedure Act:
5 U.S.C. § 706(2)(a) 10
5 U.S.C. § 706(2) 25

Child Abuse Prevention and Treatment Act, 42 U.S. C.A. §§ 5101-5106 ..... 11, 12

Child Abuse Amendments of 1984, Pub. L. No. 98-457, 98 Stat. 1749-1764 ..... *passim*

Civil Rights Act of 1964, Title VI, 42 U.S.C. §§ 2000d-2000d-4 (1982) 4, 19, 33

Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1982) ..... *passim*

29 U.S.C. § 701 18

29 U.S.C. § 706(7)(B) 17, 18

29 U.S.C. § 762(b)(11) 18

29 U.S.C. §§ 780-785 17

29 U.S.C. §§ 790-794 17

TABLE OF AUTHORITIES continued

Page

42 U.S.C. § 291m 24
42 U.S.C. § 1395 ..... 22, 23
42 U.S.C. § 1395c 23
42 U.S.C. § 1396 ..... 22, 24
42 U.S.C. § 1396a 24
45 C.F.R. §§ 80.6-80.10 39
45 C.F.R. Pt. 84 ..... 34, 39
45 C.F.R. Pt. 84, App. A, ¶ 36 ..... 34, 40
45 C.F.R. § 84.3(j)(2)(ii) 18
45 C.F.R. §§ 84.51-84.53 34
45 C.F.R. § 84.53 40
45 C.F.R. § 84.55 41
45 C.F.R. § 84.55(b) 47
45 C.F.R. § 84.61 ..... 3, 39
45 C.F.R. Pt. 1340, as amended by 50 Fed. Reg. 14887-92 (1985) 12, 47

MISCELLANEOUS:

110 Cong. Rec. (1964):
p. 6050 33
p. 6543 33
p. 7061-62 33

117 Cong. Rec. (1971):
p. 42,294 ..... 36, 37
p. 45,945 37
p. 45,974 35
p. 45,975 35

118 Cong. Rec. (1972):
p. 525 ..... 35, 36, 37
p. 526 ..... 35, 36, 37

TABLE OF AUTHORITIES continued

	Page
p. 8399	37
p. 8894	37
pp. 9495-9501	36
p. 11,789	36
p. 11,797	37
p. 16,371	37
p. 30,681	37
p. 30,682	37
p. 30,683	37
p. 32,280	37
p. 32,281	37
p. 32,282	37
p. 32,294	37
p. 32,302	37
p. 32,310	37
p. 35,155	37
p. 35,163	37
p. 35,837	37
119 Cong. Rec. (1973):	
p. 65	37
p. 5862	37
p. 5873	37
p. 5880	37
p. 5882	38
p. 5915	37
p. 6145	37
p. 7114	37
p. 7136	37
p. 7153	37
p. 18,127	37
p. 18,137	38
p. 24,562	37
p. 24,569	37
p. 24,570	37
p. 24,571	37
p. 24,580	37
p. 24,586	37, 38
p. 29,628	37
p. 29,633	37

TABLE OF AUTHORITIES continued

Page

41 Fed. Reg. (1976):
p. 20,296 ..... 4, 41
p. 20,297 5
pp. 20,296-97 41
p. 29,559 ..... 5, 41

47 Fed. Reg. 26,027 (1982) 5, 6

48 Fed. Reg. (1983):
p. 9630 ..... 5, 6, 16
p. 30,849 ..... 11, 43

49 Fed. Reg. (1984):
p. 1622 11
p. 1631 22
p. 1649 48
p. 1651 47
p. 1653 30
p. 1654 31

50 Fed. Reg. (1985):
p. 14,879 47
p. 14,880 27
p. 14,881 47
p. 14,884 47

S. Con. Res. 52, 92nd Cong., 1st Sess., 117 Cong. Rec. 42,294 (1971) 36

S. Rep. No. 246, 98th Cong., 2d Sess. (1984) 46

S. Rep. No. 318, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076 38

S. Rep. No. 890, 95th Cong., 2d Sess. (1975) 39

S. Rep. No. 1297, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388-91 .... 38, 39

S. 3044, 92nd Cong., 2d Sess. (1972) 35, 36

H.R. 12154, 92nd Cong., 2d Sess. (1972) 35

TABLE OF CONTENTS continued

Page

43 Op. Att'y Gen. No. 12 (1977) 40

R. Behrman & K. Vaughn, *Nelson Textbook of Pediatrics* (12th ed. 1983) 29

Protection of Handicapped Newborns: Hearings Before the United States Commission on Civil Rights (1985) 29, 30, 48

President's Commission for Study of Ethical Problems in Medicine and Biomedical & Behavior Research: *Deciding to Forego Life Sustaining Treatment* (1983) 29, 48, 49

American Medical Association and American Hospital Association, *The Report of the Joint Task Force on Hospital Medical Staff Relationships* (1985). 26, 27

Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Hospitals* 84 (1985) 26

American Hospital Association, *The Patient's Choice of Treatment* (1985) 27

M. Ravitch & K. Welch, *Pediatric Surgery* (12th ed. 1983) 29

Shapiro and Rosenberg, *The Effect of Federal Regulations Regarding Handicapped Newborns,* 252 J. A.M.A. 2031 (1984) 8

Kuzma, *The Legislative Response to Infant Doe,* 59 Ind. L.J. 377 (1984) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1529

MARGARET M. HECKLER, Secretary
of Health and Human Services,
Petitioner,

v.

AMERICAN HOSPITAL ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

---

BRIEF FOR THE RESPONDENTS AMERICAN HOSPITAL ASSOCIATION, *ET AL.*

This brief is submitted on behalf of the respondents the American Hospital Association ("AHA"), the Hospital Association of New York State ("HANYS") and Strong Memorial Hospital of the University of Rochester.[1]

---

[1] AHA has no parent or non-wholly-owned subsidiary companies; its only affiliate is the Hospital Research and Educational Trust. HANYS has no parent or non-wholly-owned subsidiary companies; its only affiliate is the Hospital Educational and Research Foundation. Strong Memorial Hospital, which has no affiliates or subsidiaries, is a division of the University of Rochester, a not-for-profit corporation organized under the laws of New York.

The additional respondents, the American Medical Association, *et al.*, who were plaintiffs in a suit consolidated with that of the AHA, *et al.*, below are filing a separate brief on the merits.

STATEMENT

A. Introduction

This case involves an unprecedented attempt by the federal government, through regulations promulgated under the purported authority of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794,[2] to intercede in medical decision-making concerning the treatment of newborn infants who are seriously ill. Although the Secretary of the United States Department of Health and Human Services ("DHHS") acted with an understandable motive—to prevent the repetition of a highly publicized case of apparent neglect—she did so through a regulatory effort which, as the United States Court of Appeals for the Second Circuit held, contradicted the specific terms and intent of the Rehabilitation Act. That effort also was unsupported by the clear statement of congressional intent necessary to permit such federal intervention, especially in view of the recent reaffirmation by Congress of the traditional role of the States in the protection of children. Finally, the regulatory imposition upon hospitals was inconsistent with hospitals' role and authority.

B. The Judgment Before This Court

The instant case was initiated on April 6, 1983, when AHA, HANYS and Strong Memorial Hospital filed their initial complaint in the Southern District of New York seeking an injunction against an interim final regulation promulgated by DHHS under authority alleged pursuant to section 504. *American Hospital Association, et al.* v. *Heckler*, 83 Civ. 2638-CLB (S.D.N.Y.). The regulation subjected hospitals to unprecedented and disruptive investigative activity through which petitioner sought to alter what the government inaccurately believed to be the course of medi-

---

[2] Section 504 provides in material part that:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

cal treatment decisions being made concerning seriously-ill infants.

On March 12, 1984, respondents amended their complaint to allege that, in view of the decision of the United States Court of Appeals for the Second Circuit in *United States* v. *University Hospital of the State University of New York at Stony Brook ("University Hospital")*, 729 F.2d 144 (2d Cir. 1984), the district court was required to hold that a subsequent version of the DHHS regulation, 49 Fed. Reg. 1622 (1984), had been adopted without statutory authority and, pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(C), must be set aside.[3]

In *University Hospital*,[4] the court of appeals, rejecting DHHS' attempt to obtain hospital records[5] concerning the treatment of an infant who became known as "Baby Jane Doe," held that section 504 does not "apply to treatment decisions involving defective newborn infants" and that, "[u]ntil Congress has spoken," DHHS could not investigate. 729 F.2d at 161.[6]

---

[3] On the same day, the American Medical Association and others filed a companion case, with essentially the same basis as the instant action. The district court ordered the consolidation of the two matters with the consent of the government.

[4] The *University Hospital* decision and the instant case can be viewed together because the Second Circuit, in summarily affirming this case, relied exclusively upon *University Hospital*.

[5] Because the DHHS section 504 interim final regulation directed at medical treatment had been declared invalid in the *American Academy of Pediatrics* v. *Heckler*, 551 F. Supp. 395 (1983), DHHS claimed authority for this activity under its general regulation, promulgated under section 504, governing access to records. 45 C.F.R. § 84.61 (1982), incorporating 45 C.F.R. § 80.6(c). The general regulation does not mention hospitals or medical treatment.

[6] The Second Circuit based its opinion upon its holding that, *inter alia*: (1) seriously-ill newborn infants could not be "otherwise qualified" or "subjected to discrimination" within the meaning of section 504 (729 F.2d at 155-57); (2) the legislative history of the statute shows no congressional intention to involve the federal government in the regulation of medical treatment, an area traditionally dealt with by the States (*id.* at 157-61); and (3) such regulation would impose onerous affirmative action

Shortly after the court of appeals denied a motion for *en banc* rehearing of the *University Hospital* case, the district court in the case at bar issued a Final Judgment, holding that DHHS "has no authority under section 504 to investigate or to otherwise regulate treatment decisions involving impaired newborn infants." *American Hospital Association, et al.* v. *Heckler*, 83 Civ. 2638 (CLB) (S.D.N.Y. June 11, 1984), slip op. at 3.

Consequently, the district court invalidated the final regulation and enjoined DHHS from "continuing or undertaking any other actions to investigate or regulate treatment decisions involving impaired newborn infants taken under authority of section 504 . . . ." *Id.* at 4. This judgment was summarily affirmed by Order of the court of appeals. *American Hospital Association, et al.* v. *Heckler*, No. 84-6211 (2d Cir. December 27, 1984). The petition for a writ of *certiorari* followed.

C. Factual and Legal Background of the Instant Case

1. The genesis of the regulatory effort

Section 504, neither as enacted nor as amended, contains any enforcement directives, investigative procedures or sanctions provisions. However, when it amended the Act in 1974, Congress envisioned that the heads of each federal agency would promulgate comprehensive regulations to implement it. *Cherry* v. *Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976), and authorities cited therein.[7]

---

burdens on hospitals in contravention of *Southeastern Community College* v. *Davis*, 442 U.S. 397, 441 (1979) (*id.* at 160).

[7] From the outset, the Secretary of what is now DHHS recognized that, although section 504 was patterned upon the prohibition against racial discrimination contained in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, important differences between the two statutes required differing approaches to eliminating the types of discrimination prohibited under those two statutes. For example, as to section 504, the Secretary hypothesized: "handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and *identical treatment may, in fact, constitute discrimination.*" 41 Fed. Reg. 20296 (1976), emphasis supplied.

When the Department of Health, Education and Welfare (DHHS' predecessor agency) promulgated its draft section 504 regulations in 1976, the Secretary specifically sought public comment on "[w]hether a regulation should contain provisions concerning patients' rights to receive or refuse treatment." 41 Fed. Reg. 20297 (1976). Thereafter, when the Agency published a proposed rule, which became effective in 1977, the Secretary concluded that the Act provided no authority for a rule which applied to an "institutionalized person's right to receive or refuse treatment." 41 Fed. Reg. 29559 (July 16, 1976).

Notwithstanding this thoughtful and unequivocal pronouncement, an unfortunate event occurred five years later that led the Secretary abruptly to jettison this position. In early April of 1982, a baby with Down syndrome and an esophageal obstruction that prevented normal feeding was born in Bloomington, Indiana. The obstruction was reported to be surgically correctable, but the infant's parents refused to consent to treatment. Thereupon, the hospital initiated state court proceedings which led to the appointment of a guardian *ad litem* and the undertaking of appeals. The courts refused to intervene, however, and the infant died. *See American Academy of Pediatrics* v. *Heckler,* 551 F. Supp. 395, 397 (D.D.C. 1983).

The death of the Bloomington "Baby Doe" was widely publicized and resulted in a considerable amount of critical public comment. Citing this incident, President Reagan sent a memorandum dated April 20, 1982, to the Attorney General and to the Secretary of DHHS noting that discrimination against the handicapped in programs or activities receiving federal financial assistance is prohibited by section 504. *See* 48 Fed. Reg. 9630 (1983). DHHS responded to the President's memorandum on May 18, 1982, by issuing a "Notice to Health Care Providers" published in 47 Fed. Reg. 26027 (June 16, 1982), J.A. 127-128.[8]

In that Notice, the Secretary undertook to reverse the Department's long-held position on section 504 and in-

---

[8] *See* n. 27 *infra.*

formed affected parties that medical-treatment decisions involving newborn infants with birth defects were deemed to be within the reach of federal intervention under section 504. The Notice concluded that "[t]he failure . . . to comply with the requirements of section 504 subjects that recipient to a possible termination of Federal assistance." *Id.* No further sanctions or federal enforcement activities were prescribed in that Notice.

Almost a year later, on March 7, 1983, without any notice of proposed rulemaking or opportunity for comment, a new Secretary of DHHS promulgated an interim final rule directed not at "affected parties," but solely at *hospitals.* The rule expanded upon the earlier Notice by adding sanctions and intrusions and a requirement for hospitals to display posters in conspicuous places in every delivery, maternity and pediatric ward and in each nursery declaring,

> DISCRIMINATORY FAILURE TO FEED AND CARE FOR HANDICAPPED INFANTS IN THIS FACILITY IS PROHIBITED BY FEDERAL LAW.
>
> Any person having knowledge that a handicapped infant is being discriminatorily denied food or customary medical care should immediately contact: Handicapped Infant Hotline.

The "Handicapped Infant Hotline" would be available 24-hours-a-day to all persons who wished to make complaints, including anonymous complaints. Moreover, in the preamble to the rule, DHHS asserted authority to conduct immediate investigations and make immediate referrals to the Department of Justice for such legal action as might be found necessary. 48 Fed. Reg. 9630, 9631, effective March 22, 1983.

2. The effect of the rule in hospitals

Although medical treatment decisions regarding infants are made by parents who are advised by physicians,[9] the interim final rule and its successors are directed at hospitals, which are alleged to be the recipients of federal financial assistance through Medicare payments. This focus has

---

[9] See pp. 26-28 *infra.*

created severe problems in hospitals through its fundamental and essential distortion of the respective roles and responsibilities of parents, physicians and hospitals.

From the outset, enforcement of the rule adversely affected hospitals' operations and jeopardized the provision of health care services to the very infants the rule allegedly was designed to protect. At Strong Memorial Hospital, for example, DHHS Office of Civil Rights ("OCR") investigators, during March 29-30, 1983, conducted an investigation pursuant to an anonymous hotline tip reporting that conjoined (siamese) twins under the Hospital's care might be denied nutrition or treatment. *See* Affidavit of Paul M. Rosenberg, J.A. 178-182.[10] On March 29, 1983, after reviewing the patients' medical records, lay investigators employed by DHHS engaged the patients' attending physician in a disconcerting and lengthy interview about the patients' conditions and the nature of the medical decision-making regarding them. J.A. 179.

Subsequently, a physician/investigator insisted upon examining the infants and reviewing their medical records. J.A. 180. Both the children's parents and the hospital on their behalf refused to authorize such examination and review, and the investigative squad ultimately departed. J.A. 180-181.

The investigation itself, as well as the numerous newspaper accounts which appeared in the Rochester region, generated fears in the patients' family that any further decisions that it made would have been subject to similar scrutiny. J.A. 181. As a result, the Hospital's ability to assist the family and physicians in formulating an appropriate care plan for these infants was compromised. *Id.*

The effect of the investigation, however, was broader. The parents of other critically-ill children began to question whether their children were being harmed, and one family even withdrew a seriously-ill patient from Strong Memorial before completion of treatment because of fears

---

[10] Petitioner offered no contradiction of the affidavits submitted to the District Court.

engendered by local newspaper accounts of the investigation. *Id.*

The disruptive consequences of this investigation were subsequently summarized in a thoughtful article written by persons directly involved, as follows:

> The family, the primary physician, specialists, and staff of the Neonatal Intensive Care Unit all felt "demeaned" and "under suspicion" as persons and professionals by their awareness of the federal regulations and the presence of investigators.
>
> The normal parental grieving process was altered. During the infants' illness and after their death, the parents frequently expressed confusion, depression, and a sense of disruption of their own lives that went beyond the normal grieving process. This was attributed to the existence of the federal regulations and the investigative process that occurred regarding their infants.
>
> The federal investigation was a public process that drew attention to an ordinarily private situation. Media reports sensationalized the case. The family's privacy was violated by attempts of the media to obtain information. Alterations in hospital security procedure were required to safeguard confidentiality.
>
> The emotional status of other families with infants in the Neonatal Intensive Care Unit was disrupted by the occurrence of a federal investigation into the adequacy of care provided in the Neonatal Intensive Care Unit.
>
> The time of administrators, physicians, family members, and legal counsel was utilized. The presence of a federal investigation necessitated multiple discussions and conferences involving administrative personnel and other consulting persons. A great deal of time and effort on the part of professionals was necessary to resolve the issues.
>
> Many of the above occurrences contributed to an increased cost of care for the infants.

Shapiro and Rosenberg, *The Effect of Federal Regulations Regarding Handicapped Newborns,* 252 J.A.M.A. 2031, 2033 (1984).

A DHHS investigation at Vanderbilt Memorial Hospital on March 23-24, 1983 caused similar disruptions. *See* Affidavit of Norman B. Urmy, J.A. 183-186. That investigation, which was initiated by an anonymous hotline report that alleged that ten named children were not receiving proper treatment or nourishment, resulted in the visit of three Office of Civil Rights non-physician investigators and a physician/consultant. J.A. 183-184.

Based upon their own review of the infants' files, on the afternoon of March 23, 1983, Hospital personnel had concluded that there was no medical basis for the call, since all ten patients were receiving appropriate medical care and nourishment. J.A. 184. That evening, however, Hospital personnel, including the Chief of Pediatrics and the Chief Pediatric Resident, were compelled to meet with the OCR investigators, utilizing medical records to discuss the medical history, course of treatment, nourishment and prognosis of each of the ten children. *Id.* Thereafter, in the company of the Chief of Pediatrics and the Chief Pediatric Resident, the physician/investigator made "rounds" to visit each of the patients. *Id.*

The investigation continued for most of the following day and involved both reviews of records and interviews of administrative, nursing and physician staff. J.A. 184-185. The investigation of this meritless complaint was time consuming, disruptive and expensive. The Chief of Pediatrics worked eight hours with the OCR team, the Associate Director of Nursing worked eighteen hours assisting them, and the Chief Pediatric Resident spent ten hours doing so. Six nurses were interviewed by the OCR team for a total of three hours. These doctors and nurses would, of course, have otherwise spent their time caring for patients. *Id.*

The OCR investigation also had adverse effects on medical care given the ten patients involved. For example, one patient remained in the Pediatric Intensive Care Unit longer than necessary because his chart was unavailable for the house staff to review and write discharge orders.

Additionally, on March 24, the house staff was unable to review laboratory reports and update orders following rounds because the necessary charts were in the possession of the OCR team. Copies of laboratory reports had to be ordered and numerous calls to the laboratory were required to obtain information. J.A. 185. This posed a serious threat to the appropriate care of these infants.

Furthermore, because charts had to be retrieved from the investigators, there were delays in the transporting of patients from the Pediatric Intensive Care Unit to the Operating Room. And finally, six nurses were pulled from patient assignments for interviews with the OCR team several of which occurred during changes of shifts, delaying necessary reports on patients to the nurses on the next shift. J.A. 185-86.

In view of the fact that DHHS's regulatory efforts were triggered by the Bloomington case, it is noteworthy that they uncovered no violation. Indeed, during the period that the regulatory process was in place DHHS received hundreds of hot-line calls and initiated 49 investigations. Yet no call or investigation identified a single case of improper treatment of newborns.

3. Initial litigation and petitioner's response

At a hearing on April 6, 1983, concerning the original complaint in this action filed by AHA, HANYS and Strong Memorial Hospital, based upon the adverse effect the rule was having upon hospitals, the district court issued a temporary restraining order prohibiting defendant "from enforcing [the interim final rule] solely to the extent that it purports to require the posting of notices upon the premises of voluntary or municipal hospitals within New York State . . . ." *AHA* v. *Heckler*, 83 Civ. 2638-CLB (Apr. 6, 1983).

Shortly thereafter, on April 14, 1983, the United States District Court for the District of Columbia ruled that the "interim final rule . . . is invalid as an arbitrary and capricious agency action which fails to meet the standard required under the Administrative Procedure Act, 5 U.S.C.

§ 706(2)(A)." *American Academy of Pediatrics* v. *Heckler*, 561 F. Supp. 395, 399 (D.D.C. 1983). Although the court in *American Academy* did not determine whether section 504 provided a statutory basis for the interim final rule, it indicated concern about the propriety of extending section 504's reach "into such a sensitive area" without "evidence of [congressional] intent," and expressed the hope "that this will be clarified by further congressional action." *Id.* at 401-402.

Responding to this judicial invalidation, DHHS on July 5, 1983, attempted to comply with Administrative Procedure Act requirements and proposed a somewhat revised rule (48 Fed. Reg. 30846 (1983)), which itself was slightly modified when the Agency issued its final regulation on January 12, 1984. 49 Fed. Reg. 1622 (1984), J.A. 11-126. The essential provisions, including the notices, hotline and investigations, remained. It was this final regulation that was invalidated in the instant case. Section 504 of the Rehabilitation Act was the only authority asserted by DHHS for all of the foregoing regulatory activity.

D. The Child Abuse Amendments of 1984

In February 1984, Congress began its own consideration of the appropriate method of assuring the protection of seriously-ill infants. In September 1984, seven months after the appellate court's decision in *University Hospital* and three months after the district court in the instant case enjoined DHHS from enforcing or implementing its section 504 regulations, or undertaking any related regulatory or investigative activity, Congress enacted the Child Abuse Amendments of 1984, Pub. L. 98-457, 98 Stat. 1749, *et seq.* (1984). This legislation, which amended the Child Abuse Prevention and Treatment Act (42 U.S.C. §§ 5101, *et seq.*), specifically addresses the issue of withholding medically-indicated treatment (including appropriate nutrition) from disabled infants with life-threatening conditions. Significantly, those amendments are altogether consistent with the longstanding primary role of the States in the area of child protection.

The Child Abuse Amendments, which Congress enacted after consultation with a variety of individuals and organizations, including the American Hospital Association, condition the States' continued qualification for certain federal grants upon the States' development and implementation of certain new procedures or programs within their child protective services systems. States must have programs or procedures for the purpose of responding to reports of medical neglect, including withholding of medically-indicated treatment from disabled infants with life-threatening conditions.[11]

The Child Abuse Amendments also require DHHS to promulgate regulations implementing the requirements of the provision described above [42 U.S.C. § 5103(b)(2)(K) (as added by Section 122(3) of Pub. L. No. 98-457)].[12] In addition, the statute requires DHHS to promulgate model guidelines to encourage hospitals to establish committees which would serve the purposes of "educating hospital personnel and families of disabled infants with life-threatening conditions, recommending institutional policies and guidelines concerning the withholding of medically indicated treatment from such infants, and offering counsel and

---

[11] These programs and/or procedures must provide for:

> (i) coordination and consultation with individuals designated by and within appropriate health-care facilities;
>
> (ii) prompt notification by individuals designated by and within appropriate health-care facilities of cases of suspected medical neglect (including instances of withholding of medically indicated treatment from disabled infants with life-threatening conditions); and
>
> (iii) authority, under State law, for the State child protective service system to pursue any legal remedies, including the authority to initiate legal proceedings in a court of competent jurisdiction, as may be necessary to prevent the withholding of medically indicated treatment from disabled infants with life-threatening conditions.

Pub. L. No. 98-457, § 122(3), 98 Stat. 1752-53, *amending* 42 U.S.C. § 5103(b)(2).

[12] On April 15, 1985, DHHS published its final rule implementing the Child Abuse Amendments. 45 C.F.R. Part 1340, as amended by 50 Fed. Reg. 14887-92.

review in cases involving disabled infants with life-threatening conditions." Pub. L. No. 98-457, § 124(b)(1), 98 Stat. 1754.

In addition, the Child Abuse Amendments provide a detailed definition of the term "withholding of medically indicated treatment." *See id.*, § 121(3), *amending* 42 U.S.C. § 5102. Significantly, by the terms of that definition there can be *no* impermissible "withholding of medically indicated treatment" when:

> in the treating physician's or (physicians') reasonable medical judgment, (A) the infant is chronically and irreversibly comatose; (B) the provision of such treatment would (i) merely prolong dying, (ii) not be effective in ameliorating or correcting all of the infant's life-threatening conditions, or (iii) otherwise be futile in terms of the survival of the infant; or (C) the provision of such treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.

Id.

In summary, the Child Abuse Amendments address the issue of medical treatment decisions concerning seriously-ill infants in a detailed and comprehensive manner which recognizes: (a) the States' traditional oversight and enforcement role; (b) the considerable importance of the treating physicians' judgments; and (c) the *inappropriateness* of requiring the provision of treatment in certain statutorily-specified circumstances. *See id.*, §§ 121(3), 122(3).

SUMMARY OF ARGUMENT

The publicity generated by the Bloomington "Baby Doe" case led the federal government to the unsubstantiated belief that a national problem existed that called for direct federal intervention. In the absence of any clear statutory basis for such intervention, petitioner abandoned a clearly-held agency position to the contrary, and took a Procrustean view of section 504 of the Rehabilitation Act of 1973, asserting that it permitted the government to intercede in the medical treatment of seriously-ill infants. This

view is unsupported by any manifestation of congressional intent and otherwise conflicts with law, with the traditions of American medical practice, particularly the attending physicians' professional commitment and devotion to their special mission, and with our culture's emphasis upon parental responsibility and caring.

The plain meaning of section 504 does not support its application to the treatment of seriously-ill infants. As the Court of Appeals held, such infants are not "otherwise qualified handicapped individuals" within the meaning of the statute because the term has no logical application to infants in the context of treatment. Instead, the term "qualified" can only relate to qualification for vocational training and independent-living programs, which require independently demonstrable abilities that would allow successful participation.

There is no meaningful, specific connection between the treatment of infants in hospitals and the statutorily-required "program or activity receiving Federal financial assistance." Medicare and Medicaid are the asserted links, but those programs provide aid to individuals, not to treatment facilities or their activities. Moreover, under the Medicare and Medicaid statutes and the terms and conditions of their acceptance, and the controlling law of this Court, the government may not involve itself in treatment decisions through these programs.

Additionally, and specifically in regard to hospitals, there is no pertinent service from which infants could be shown to be excluded by virtue of unlawful discrimination. A medical treatment decision may be assessed to have been well-founded or inappropriate, but in making such a determination, the impaired child by definition cannot be compared to one who is unafflicted because the medical treatment decisions are necessarily different. Medical decisions are made across a broad continuum of cases of varying complexity and severity, but all of which are united by the fact that there is a patient with an illness or condition as to which treatment is to be considered and choices made.

These choices do not exclude or deny benefits of any program, or discriminate against the impaired individual. Indeed, the choices are compelled precisely because of the existence of the impairment.

If section 504 is at all applicable to hospitals in these circumstances, it is to ensure infants' access to medical services, not to regulate choice of treatment within facilities. However, even petitioner has never suggested that the question of access is at issue, and the regulation that was invalidated below was not directed at guaranteeing access to medical facilities. Instead, its intent was to influence treatment decisions in cases of children who have been afforded access to hospitals. Those treatment choices are not within the compass of the "discrimination" prohibited by section 504.

Should the Court conclude, however, that the language of section 504 is ambiguous on its face or in the application sought, the legislative history of the statute demonstrates the lack of congressional intent to authorize federal intervention in individual medical treatment choices. Petitioner's incomplete or selective quotation of various legislators' pronouncements is at odds with the intention of Congress to guarantee the handicapped access to various programs and facilities, particularly involving education, vocational rehabilitation and living in non-institutional settings.

Finally, with no clear statement of legislative intent to the contrary, Congress cannot be presumed to have superseded the traditional role of the States in dealing with child protection and medical treatment. Indeed, that role was recently reaffirmed in the Child Abuse Amendments of 1984, which serve as part of comprehensive child-protective mechanisms which are in fact assuring that appropriate medical attention is being furnished to seriously-ill infants, without jeopardizing the important and delicate parent-physician relationship in which treatment decisions are considered and made.

ARGUMENT

I. Congress Did Not Intend That Section 504 Of The Rehabilitation Act Of 1973 Would Authorize The Federal Government To Intervene In Medical Treatment Decision-making Concerning Seriously-ill Newborn Infants.

Petitioner's attempts to intervene in the medical treatment of seriously-ill infants through regulations aimed at hospitals came as a result of a Presidential directive occasioned by the death of the Bloomington "Baby Doe" and the widespread publicity and controversy surrounding it. *See* 48 Fed. Reg. 9630 (1983); *American Academy of Pediatrics* v. *Heckler, supra,* 551 F. Supp. at 397; Kuzma, *The Legislative Response to Infant Doe,* 59 Ind. L. J. 377, 377-78, 386 (1984).

There was, in the executive branch of the federal government, the expressed desire to act quickly to prevent the repetition of such a case. However, lacking a federal statute that authorizes DHHS to intervene in medical treatment decisionmaking,[13] petitioner was compelled to contrive some authority to involve the federal government, and so turned to the antidiscrimination provisions of section 504. However, Congress never intended for that statute to apply to the medical treatment of infants or the regulation of such treatment through hospitals.

Congressional intention may be fathomed in two ways: by the plain meaning of the words Congress employed in its enactment; and by an analysis of the legislative history. If the primary inquiry is not determinative because of statutory ambiguity, the Court will turn to the secondary process. Respondents will discuss each in turn.

A. The Plain Meaning of Section 504 Does Not Provide Authority for Petitioner's Attempts To Regulate Hospitals Through Intervention in the Medical Treatment of Seriously-Ill Infants.

This Court has long held that under the "plain meaning rule," the interpretation of a statute "must, in the first in-

---

[13] Indeed, there are several which prohibit it. See pp. 23-24, *infra.*

stance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). *See American Tobacco Co.* v. *Patterson*, 456 U.S. 63 (1982); *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979). And in analyzing the scope of section 504 itself, this Court only recently held that interpretations stretching the statute beyond "manageable bounds" should be avoided. *Alexander* v. *Choate*, —— U.S. ——, 105 S. Ct. 712, 720 (1985). The protections of section 504 extend only to *"otherwise qualified handicapped individuals,"* to the extent that such a person is within *"any program or activity receiving Federal financial assistance."* If those definitional prerequisites are met, the protected individual may not "be *excluded* from participation . . . be *denied* the benefits of . . . *or* be *subjected to discrimination*" by the federal recipient. In the instant case, petitioner would strain section 504 beyond permissible limits as to the application of each of its operative terms.

1. Infants with birth defects are not "otherwise qualified handicapped individuals" within the means of the statute.

The definition of a "handicapped individual" held by the Court of Appeals to be applicable to hospitalized infants is that contained in 29 U.S.C. § 706(7)(B), which protects "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." *United States* v. *University Hospital, supra*, 729 F.2d at 155.[14]

---

[14] This section (7)(B) definition applies for "purposes of subchapters IV and V of this chapter." Subchapter IV, 29 U.S.C. §§ 780-785, concerns the activities of the National Council of the Handicapped, while Subchapter V, 29 U.S.C. §§ 790-794, encompasses "Miscellaneous Provisions" dealing essentially with issues of employment by governmental entities and under federal contracts and the elimination of architectural, transportation and communications barriers.

Although it is readily apparent that seriously-ill infants have significant "physical or mental impairments," these impairments are not relevant to "major life activities" within the meaning of the statute.[15] The Rehabilitation Act does not define the latter phrase, but DHHS's regulations do. Under 45 C.F.R. § 84.3(j)(2)(ii), " 'Major life activities' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." The focus of this definition is clearly upon the ability to benefit from programs of education, employment opportunities, and independent living and does not apply to newborn infants. See 29 U.S.C. § 701.

The condition of these seriously-ill infants at the time that petitioner would intervene in their treatment is inconsistent with the discussion of their physical abilities, particularly those related to education, training and independent living. This inconsistency becomes even more pronounced when the term "handicapped individual" is read along with the term "otherwise qualified" that precedes it in the statute.

As the Second Circuit held in *University Hospital*, "the government's view of 'otherwise qualified' is divorced from the statutory language." 729 F.2d at 156.

> In common parlance, one would not ordinarily think of a newborn infant suffering from multiple birth defects as being "otherwise qualified" to have corrective surgery performed or to have a hospital initiate litigation seeking to override a decision against surgery by the infant's parents. If congress intended section 504 to apply in this manner, it chose strange language indeed.

Id. Petitioner's response in this Court is nothing more than an attempt to read the term "otherwise qualified" out of

---

[15] The Court of Appeals understood this argument, but noted that the present condition of an infant would affect his or her ability to perform such functions in the future. Therefore, in view of amendments (29 U.S.C. § 762(b)(11)) by which Congress sought to make available rehabilitative services to children of preschool age, the court concluded that a seriously-ill infant is a "handicapped individual" within the definition of section 706(7)(B). Respondents take issue with this conclusion.

the statute in order to apply the statute to medical treatment. In its stead, petitioner would substitute a medical-benefit criterion which is utterly at odds with the statute and those cases interpreting it.

In *Southeastern Community College* v. *Davis, supra,* 442 U.S. at 406, this Court held that an "otherwise qualified handicapped individual" is, within the plain meaning of section 504, "one who is able to meet all of a program's requirements in spite of his handicap." *See Alexander* v. *Choate, supra; Doe* v. *New York University,* 666 F.2d 761 (2d Cir. 1981). In those terms, a handicapped person is protected by that statute, *i.e.,* he or she is "otherwise qualified," when the handicap is an irrelevancy to the acceptable performance of the function encompassed in the covered "program or activity." In other words, a protected handicapped person and a non-handicapped person each have essentially the same basic capabilities necessary for achievement in the same undertaking.[18]

In this analytical mode, the determination of qualification under section 504 of the Rehabilitation Act is essentially the same as the determination of racial discrimination under Title VI of the Civil Rights Act of 1964. In both cases, the distinction is between the function to be performed, for example, work or education, and factors having no bearing on performance, for example, an immaterial physical infirmity or the color of a person's skin. No such separation can be made in the case of the medical treatment of a seriously-ill infant. Here, it is the "handicap," *i.e.,* the illness or birth defect, that is the subject of the medical decision-making process. The term "otherwise qualified" has no meaningful application in this context. *University Hospital, supra,* 729 F.2d at 156.

Petitioner argues that the only legitimate qualification for an infant's medical treatment is the child's admission

---

[18] Thus, while a recipient covered by section 504 might be required to make limited reasonable accommodations to handicapped persons, *Alexander* v. *Choate, supra,* section 504 clearly does not impose an "affirmative-action obligation on all recipients of federal funds." *Southeastern Community College* v. *Davis, supra,* 442 U.S. at 411.

to a hospital that is capable of providing services from which he or she might derive some benefit. See Brief for Petitioner at 22-23. This postulation avoids all consequences of the term "otherwise qualified" as it is used in section 504. In the first place, the benefit argument assumes that the covered program or activity is the medical treatment decision itself, an assumption that could never be supported by authority or evidence of congressional intent. In the second place, and more importantly, the infant, under petitioner's argument, is not "one who is able to meet all of a program's requirements *in spite of* his handicap," as the Court required in *Davis*.[17] Instead, the infant is one who requires medical evaluation *because of* his handicap.

In short, petitioner's suggested reading of "otherwise qualified" deprives the term of any meaning consistent with anything that Congress could have contemplated, given the remaining terms of section 504. To apply the term in the context of the medical treatment decision-making process, once an infant has been admitted to a facility where that process can be undertaken. destroys the plain meaning of the term.

2. Given the plain meaning of the statute petitioner can identify no federally-financed program or activity affecting medical treatment decisions from which hospitals could be shown to be discriminating against seriously-ill infants.

"Section 504, by its terms, prohibits discrimination only by a 'program or activity receiving Federal financial assistance.' " *Consolidated Rail Corp.* v. *Darrone*, —— U.S. ——, 104 S. Ct. 1248, 1255 (1984). *See Grove City College* v. *Bell*, —— U.S. ——, 104 S. Ct. 1211 (1984); *North Haven Board of Education* v. *Bell*, 456 U.S. 512 (1982). "Clearly, this language limits the ban on discrimination to the specific program that receives federal funds." *Darrone, supra*, 104 U.S. at 1255. Petitioner only begs the question of whether there is a pertinent program or activity linking hospitals with alleged denials of medical treatment to seriously-ill

[17] 442 U.S. at 406 (emphasis supplied).

infants. A careful analysis shows that there can be no such program or activity applicable in any material way and so, on its face, Section 504 has no applicability to hospitals in the context of medical treatment decisions.

In justifying the regulatory focus on hospitals, petitioner identifies two programs, Medicare and Medicaid (see Brief for Petitioner at 20 n.9), which presumably establish the statutorily-required nexus. However, petitioner readily concedes that because the court of appeals in *University Hospital*, and the district court and court of appeals in the instant case, held in favor of respondents on the supervening question of statutory authority, they "had no occasion to consider whether Medicare or Medicaid payments constitute 'Federal financial assistance' and, if so, what the scope of the assisted 'program or activity' should be." *Id.*[18] For obvious reasons, petitioner would leave that question for another day. *Compare Consolidated Rail Corp.* v. *Darrone*, *supra*. However, the question is susceptible of resolution, and, as a threshold matter, it can be shown that hospitals are not recipients of federal financial assistance having any meaningful connection with the regulatory activity at issue. Moreover, whatever federal financial assistance a hospital might be held to receive has no "program-specific" relationship to medical treatment decision-making, the activity that the government sought to regulate.

a. Medicare and Medicaid do not constitute federal financial assistance.

Respondents submit that Medicare and Medicaid payments do not constitute federal financial assistance to hos-

---

[18] Petitioner accurately states that the district court in *University Hospital* held that a hospital's receipt of Medicare and Medicaid payments constituted federal financial assistance, and that holding is consistent with the only court of appeals decision on the subject, *United States* v. *Baylor University Medical Center*, 736 F.2d 1039 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 958 (1985). While respondents submit that these holdings are incorrect, the holdings also cannot determine the question of scope in this case. However, that determination can be made. At its broadest, that scope is insufficient to satisfy facial statutory requirements where a regulation aimed at influencing medical treatment decisions is directed at hospitals.

pitals within the meaning of section 504.[19] The statute does not define the term, and there are very few cases which show a reasoned analysis of the concept.[20] However, Medicare (42 U.S.C. §§ 1395, *et seq.*) and Medicaid (42 U.S.C. § 1396) provide payments ultimately received by hospitals that can hardly be looked at as subsidies to them. Instead, the payments made under both programs are payments for covered services to patients, which payments, by statute, cannot exceed the fair market value of those services.

Under these circumstances, there can be no question that such payments are assistance to the individuals treated, but not to the hospitals where the treatment is provided. *See Cook* v. *Budget Rent-A-Car Corp.*, 502 F. Supp. 494 (S.D. N.Y. 1980). *Cf. Jones* v. *Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376, 1380 (11th Cir. 1982), *cert. denied*, 104 S. Ct. 1591 (1984); *Doe* v. *Region 13 Mental Health-Retardation Commission*, 704 F.2d 1402 (5th Cir. 1983).[21]

---

[19] *But see United States* v. *Baylor University Medical Center*, *supra*. Although the government concedes that parents of seriously-ill infants are not recipients of federal financial assistance, and that it cannot regulate parents, 49 Fed. Reg. 1631 (1984) (J.A. 43), nevertheless, DHHS' final rule is—improperly—aimed at regulating or influencing parental decision-making through pressure on hospitals.

[20] The issue did not have to be treated in *Grove City College* v. *Bell*, *supra*, because the Basic Educational Opportunity Grants at issue there were, by the specific terms of the statute authorizing them, federal financial assistance to the college, or as the Court held, to the specific activity—the financial aid office—that processed the funds received from the government. *See* 104 S. Ct. at 1218.

[21] Petitioner essentially argues that if a hospital "sells" its product (*i.e.*, health care services) to beneficiaries of the Medicare or Medicaid programs, the hospital (or, given *Grove City*, *supra*, some part of a hospital) becomes a federally-assisted program. Under the logic of petitioner's argument, any vendor selling goods or services to any federally subsidized entity would thereby become, in some part, a federally-assisted program itself.

However, in its petition for a writ of *certiorari* in *Department of Transportation* v. *Paralyzed Veterans of America*, No. 85-289, seeking reversal of 752 F.2d 694 (D.C. Cir. 1985), *cert. granted*, 54 U.S.L.W. 3262 (U.S.

b. Medicare does not involve the treatment of newborns, and its specific terms prohibit governmental interference in the treatment that it does involve.

Given the fact that the entire purpose of petitioner's invalidated regulation was to affect the care being given to seriously-ill infants, her attempt to satisfy section 504's program-specific requirements by relying upon the Medicare program is a strange anomaly because it does not cover the care of such infants. As 42 U.S.C. § 1395c makes clear, Medicare covers two categories of persons: those over the age of 65; and certain disabled persons under the age of 65 who have been entitled to designated Social Security survivors' benefits for at least 24 months. Those categories do not include the newborn infants with whom the government has been concerned in this case.

As to the care of the aged and disabled which is covered by Medicare, 42 U.S.C. § 1395 provides that:

> Nothing in this title shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services, or to exercise *any super-*

October 22, 1985), the government takes a contradictory view. There, the government criticizes the D.C. Circuit for deciding that the airlines' use of federally-subsidized airports renders the airlines' provision of commercial air transportation a federally-assisted program or activity subject to section 504.

In its petition, the government relied heavily on Judge Bork's dissent from the court's denial of a suggestion for rehearing *en banc* in which he observed that the panel's "reading of section 504's statutory language would make every commercial enterprise a 'recipient' of federal aid when it merely makes use of a service or facility that receives any federal assistance." *Department of Transportation* v. *Paralyzed Veterans of America*, No. 83-1055 (D.C. Cir. April 26, 1985) (Bork, J., dissenting), slip op. at 1. *See* Petition of Department of Transportation in No. 85-289 at 20-21.

If the airlines' utilization of federally-funded airports does not convert them into federally-assisted programs, neither should hospitals be deemed recipients of federal assistance because they provide services to persons whose medical bills are paid by the government.

> *vision or control over the administration or operation of any such institution,* agency, or person. (Emphasis supplied.)

In other words, even assuming that Medicare were otherwise a relevant nexus to hospitals, Congress has specifically forbidden the federal government from undertaking through that insurance program the activities that it had intended in regard to seriously-ill infants.[22]

c. Medicaid is not an appropriate link to the federal regulation of hospitals.

Medicaid is a medical-assistance program operated essentially by state governments for a variety of impoverished persons including children under grants-in-aid provided by the federal government. 42 U.S.C. § 1396. All states operate Medicaid programs, except Arizona, which operates an alternative program under a demonstration authority. While the monies spent are federal in origin, payments to hospitals are made by each state pursuant to different and specific requirements established by that state. Those requirements involve state-determined payment principles and eligibility criteria. 42 U.S.C. § 1396a. Moreover, as far as the participation of hospitals within the States, nothing in the statute provides for any federal intervention or supervision.

In *Alexander* v. *Choate, supra,* the Court rejected the notion "that the benefit provided through state Medicaid programs is the amorphous objective of 'adequate health care.'" 105 S. Ct. at 722. Instead, the Court noted that "Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services . . . ." *Id.*

The Court thus has precluded the very mode of outcome analysis that petitioner would employ here in alleging that

---

[22] A similar prohibition of federal interference was enacted under the now-expired Hill-Burton program which provided construction grants. See 42 U.S.C. § 291m.

Medicaid constitutes federal financial assistance of a specific enough nature to allow the regulation of medical care—*i.e.*, the influence over its outcome—in hospitals. In view of *Alexander* v. *Choate*, petitioner's position has been foreclosed. Medicaid simply provides no program-specific basis to regulate medical care in hospitals.[23]

For all of the foregoing reasons, petitioner cannot possibly satisfy section 504's threshold requirement that regulation under it be premised, in this case, upon the identification of a federally-financed program or activity from which hospitals could be shown to have discriminated against seriously-ill infants.[24]

3. Medical treatment decision-making cannot constitute discrimination by hospitals within the plain meaning of section 504.

In the previous sections, respondents have demonstrated that section 504, on its face, cannot furnish authority for the federal regulation of the treatment of seriously-ill infants because those infants are not "otherwise qualified handicapped individuals" and because there is no "program or activity receiving Federal financial assistance" of which hospitals are direct beneficiaries that can be linked to the specific matter that the government sought to regulate. There is yet a final jurisdictional barrier that petitioner cannot surmount, and it is at the very heart of the case. That is the element of discrimination.[25] And rather

---

[23] Furthermore, because nothing in any relevant statute or regulation could be said to have given hospitals unambiguous notice prior to their acceptance of Medicare or Medicaid payments that such acceptance would subject them to such conditions, the inadequacy of statutory notice renders those conditions unenforceable. *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1 (1981).

[24] Petitioner therefore acted unlawfully in promulgating a regulation which assumed the existence of federally-financed programs or activities involving hospitals without any factual basis. 5 U.S.C. § 706(2).

[25] Section 504 protects covered individuals from being "excluded from the participation in," "denied the benefits of" or "subjected to discrimination under" federally-financed programs or activities.

Citing statutory and regulatory provisions that require that hospitals not discriminate against alcoholics or drug addicts, petitioner contends

than "requir[ing] little discussion," as petitioner suggests (Brief for Petitioner at 26), the issue is worthy of analysis.

a. Hospitals do not make treatment decisions.

Throughout petitioner's brief, there is a stated view of the authority and function of hospitals that has no basis in law or fact. That view is that hospitals make treatment decisions. See, *e.g.*, Brief for Petitioner at 12, 13, 15 and 45. They do not; treatment choices are, in all cases relevant here, made by the parents of infants in consultation with physicians. Accordingly, it is not possible for a hospital to "exclude from," "deny benefits" to, or "subject to discrimination," as to treatment, a patient who has been admitted to its facilities. Therefore, section 504 cannot be applied to a hospital on the basis of a claim that an infant is being denied a particular course of medical treatment.

Within the network of interrelated responsibilities at an American hospital, it is the individual physician who bears the responsibility for treatment of his or her patients. *See* Joint Commission on Accreditation of Hospitals ("JCAH"), *Accreditation Manual for Hospitals* 84 (1985).[28] American Hospital Association and American Medical Association, *The Report of the Joint Task Force on Hospital*

---

that these provisions demonstrate "the application of section 504 to medical treatment decisions . . . ." Brief for Petitioner at 42; *see id.* at 37-39. To the contrary, these provisions were not directed at treatment decisions, but at access. *See* S. Rep. 93-208, 93d Cong., 1st Sess. 14 (1973). Substance abusers had been excluded from some medical facilities because of those persons' arguably disruptive behavior. Congress sought to change that situation, but not to affect the nature of treatment given when such persons were admitted to hospitals. Additionally, the specific inclusion of substance abusers within the coverage of section 504 cannot, as petitioner argues, be taken to encompass a category of persons—infants—who are not mentioned in the inclusive language. If any inference can be made from the provisions cited by petitioner it is that Congress did not intend to expand the coverage of section 504 to medical treatment decisions made as to seriously-ill infants.

[28] Pursuant to the Medicare Act, DHHS recognizes accreditation by JCAH for purposes of determining hospital compliance with the conditions of participation in the Medicare program.

Medical Staff Relationships ("Joint Task Force Report") 13 (1985). Although the hospital's governing board is fundamentally responsible for insuring "the delivery of quality, cost-effective health care to patients in the hospital" (Joint Task Force Report at 10), and although the hospital's organized medical staff "uses its collective professional skills, knowledge, and judgment to provide overall surveillance of the quality and adequacy of medical care provided by individual physicians in the hospital environment" (*id.* at 13), neither the governing board nor the medical staff can assume the individual physician's role or responsibility in the treatment of individual patients. *Id.* at 13.

When a patient, such as a seriously-ill infant, is unable to express his or her preference among treatment options, the decision as to the most appropriate course of treatment resides with the infant's parents in consultation with the treating physician. Indeed, DHHS recognized this role in the April 1985 regulation implementing the Child Abuse Amendments of 1984, stating "the decision to provide or withhold medically-indicated treatment is, except in highly unusual circumstances, made by the parent or legal guardian . . ." 50 Fed. Reg. 14880 (1985). *See also, Parham* v. *J.R.*, 442 U.S. 584 (1979), in which the Court expressed "confidence in the medical decisionmaking process" (*id.* at 612) and recognized the right of parents, in consultation with physicians, to have a mentally-ill child institutionalized, even over the child's objections (*id.* at 604-621); *Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) (recognizing appropriateness of family decisions made in consultation with physicians, to remove life support from incompetent daughter); American Hospital Association, The Patient's Choice of Treatment Options 2-3 (1985). DHHS' section 504 regulation, however, which by its terms was applicable solely to hospitals, in its implementation could have achieved its effect only by regulating the professional role and responsibilities of *physicians* vis-a-vis certain of their patients, a responsibility which the hospitals themselves may not assume. Inevitably, the operation of this

regulation intruded upon and impaired the complicated and delicate relationships among physicians, parents and infants. *See* Affidavit of Richard L. Epstein, J.A. 164-65. *See also* Affidavit of Peter A. M. Auld, M.D., J.A. 167-170; Affidavit of Rita Gilman Harper, M.D., J.A. 173-76. Thus, the implementation of the regulation disrupted that which petitioner was seeking to guarantee: the delivery of effective medical care to infants. *See* Affidavit of Paul M. Rosenberg, J.A. 178-182; Affidavit of Norman B. Urmy, J.A. 183-186.

That disruption also emphasized the inappropriateness of attempting to extend section 504 to compel hospitals to alter the course of treatment that the federal government might find objectionable. Because hospitals cannot make the treatment decisions that petitioner would attack as "discriminatory," section 504, by its explicit terms, cannot be applied to hospitals as petitioner seeks to do.

b. Medical treatment decisions cannot constitute discrimination, denial or exclusion within the meaning of section 504.

Drawing upon the facts of the Bloomington "Baby Doe" case, petitioner once more offers the simplistic view rejected by the court of appeals in *University Hospital.*[27] Again, misunderstanding the fact that hospitals cannot make treatment decisions, petitioner argues that if surgery would not be performed on a "handicapped" infant that would be performed on a non-handicapped child, the hospital (not the parent or the physician) would have discriminated against that child in violation of section 504. In rejecting this view, the court of appeals held that "the government has taken an over-simplified view of the medical

---

[27] The inapplicability of petitioner's attempts to affect medical treatment by regulating hospitals is further demonstrated by the fact that there is absolutely no evidence of a hospital's refusing to provide services where a parent has consented to an infant's treatment. Nor is there any evidence of a hospital's not standing ready to provide services but for a parent's refusal to consent. Indeed, that is precisely what happened in the Bloomington case. Because hospitals do not have the authority to make treatment decisions, petitioner's regulations were both futile and unnecessary.

decision-making process. Where the handicapping condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was 'discriminatory.' " *University Hospital, supra,* 729 F.2d at 157.

The court's decision comports with current medical knowledge. As recent published testimony before the United States Commission on Civil Rights makes clear, virtually all seriously-ill infants have a number of disabling conditions that must be considered and treated in an interrelated fashion. *See* Protection of Handicapped Newborns: Hearings Before the United States Commission on Civil Rights (1985) ("Civil Rights Commission Hearings") at 7-9, 35-36, 48-50, 55-56 (testimony of Dr. Mildred Stahlman); 13-16 (testimony of the Surgeon General, Dr. C. Everett Koop); 17-19 (testimony of Dr. David McClone). This observation is supported in the general medical literature as well.[28] The court of appeals was thus correct in holding that the discrimination paradigm offered by petitioner is not reasonably related to common medical experience. The more cer-

---

[28] *See* President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behaviorial Research, *Deciding To Forego Life Sustaining Treatment* ("President's Commission Report") 199-203 (1983); M. Ravitch & K. Welch, *Pediatric Surgery* 464-65 (3d ed. 1979) (surgery to correct tracheoesophageal fistula and factors contributing to increased survival rates); R. Behrman & V. Vaughn, *Nelson Textbook of Pediatrics* (12th ed. 1983) at 295-97 (varieties and causes of Down syndrome); 311 (incidence and causes of various congenital malformations); 414-15 (various viral infections to which neonates may fall prey); 423 (inborn errors of metabolism and the clinical effects, including irreversible damage); 478-79 (Gm2 gangliosidoses—cerebral degeneration and early death); 847-49 (diagnosis and problems of treatment of toxoplasmosis—a parasitic infection which can cause cerebral calcification, psychomotor retardation, convulsions, and hydrocephalus or microcephaly); 908-909 (causes and treatment of intestinal malrotation and ileal or jejunal obstruction of the intestine); 1482-88 (causes and treatment of adrenocortical hyperfunction leading to genital abnormalities); and 1560-70 (causes and treatment of various defects of the nervous system including anencephaly, encephalocele, spina bifida with myelomeningocele, spina bifida occulta, holoprosencephaly, hydranencephaly, lissencephaly, microcephaly and hydrocephalus).

tain event is that the child's condition is what gives rise to the need for a physician to consider treatment and the parent to make the decision as to whether it should be provided and, if so, to what extent.

The testimony and writings of physicians, including the United States Surgeon General,[29] uniformly describe medical care decisions as being made along a continuum of many cases of varying complexity and severity, but all of which can be characterized by the fact that there is a patient who has an illness or condition, almost always several, whose treatment potentialities must be evaluated by those with the authority to make choices. Hospitals do not have that authority. These determinations may be assessed to be effective or ineffective, or even medically-appropriate or inappropriate,[30] but they have nothing to do with comparisons to well children, who require no medical judgments. Nor do they have anything to do with "discrimination" under section 504.

Petitioner herself offers considerable support for this conclusion. Petitioner has stated the position that no violation of section 504 would arise with regard to failure to treat an infant so seriously ill that such treatment is "futile" or would "do no more than temporarily prolong the act of dying." 49 Fed. Reg. at 1653, J.A. 123. This position is consistent with the testimony of the Surgeon General and others that it would be medically inappropriate to provide treatment that would cause pain to the patient and which would not significantly ameliorate the patient's condition, even if it temporarily staved off death. *See* Civil Rights Commission Hearings at 24, 33 (testimony of Dr. David McClone); *id.* at 32-33, 48-50 (testimony of Dr. Mildred Stahlman); *id.* at 34 (testimony of Dr. R. Everett Koop).

---

[29] *See, e.g.*, Civil Rights Commission Hearings at 13-16 (testimony of Dr. R. Everett Koop); *id.* at 7-9, 35-36, 48-50 (testimony of Dr. Mildred Stahlman).

[30] Some of the mechanisms for these determinations under the aegis of traditional state authority are discussed in Argument II, *infra*, at pp. 43-45.

It is notable that what DHHS is effectively contending is that when a seriously-ill infant reaches a certain level of or combination of defects, the asserted protections of section 504 no longer apply. Moreover, the federal government claims for itself an extensive right to determine when this point has been reached.[31] Section 504, on its face, provides no support for such authority, which fundamentally contradicts traditional American medical decision-making. However, petitioner's assertion of it undoes her postulation of how medical treatment decisions can constitute unlawful discrimination.

If the hypothetical child with Down syndrome, described in petitioner's brief, is being denied surgery solely because of his or her condition, as petitioner suggests, so is the terminally-ill child, who petitioner states does not have to be treated, even though it might be shown that that child's life might be prolonged. Both cases may be reduced to the simplest level, each child having only a single condition or "handicap" and each, according to petitioner's theory, being denied treatment solely because of it. In one case, however, the government would approve the denial, in the other case, it would assert that section 504 had been violated. This contradiction demonstrates two things: that the federal government was seeking to supersede the authority of parents and physicians to make medical decisions; and that a treatment decision as to a seriously-ill infant cannot constitute discrimination with the plain meaning of section 504.[32]

---

[31] Although petitioner would require that the medical treatment of seriously-ill infants meet a DHHS-determined "standard of care," petitioner has conceded that "every case must be examined on its individual facts." 49 Fed. Reg. 1654, J.A. 122. It was, indeed, the fact that "no two cases are likely to be the same," that led the court in *University Hospital* to conclude that these cases would burden the courts with "lengthy litigation primarily involving conflicting expert testimony" on issues of "medical judgment." 729 F.2d at 157. *Compare United States* v. *Erika*, 456 U.S. 201 (1982).

[32] This is not to say that section 504 can never be applied to a hospital. Assuming the existence of a hospital program that is specifically assisted with federal funding, a hospital might discriminate if it denied a handi-

B. Because The Legislative History Of Section 504 Is Concerned Entirely With Programs Of Education, Vocational Training and Independent Living, And Contains No Indication That Medical Treatment Decisions Were To Be Addressed, That Legislative History Provides No Basis Of Authorization For The Federal Government To Regulate The Medical Treatment Of Seriously-Ill Infants.

Although the Court need go no further than the plain meaning of section 504's language to hold that the statute was not intended to reach medical treatment decision-making in regard to seriously-ill infants, any ambiguity in the meaning or application of that language may be resolved by a review of the legislative history which demonstrates, as the Second Circuit concluded in *University*

---

capped person access to that program if the program is otherwise generally available. In the instant case, there is no question that seriously-ill infants, whether they are viewed as "otherwise qualified handicapped individuals" or not, are being admitted to American hospitals where they become involved in the treatment process. Thus, the regulation that was invalidated below was not directed at guaranteeing access to hospitals but instead at influencing the course of treatment of seriously-ill infants already within hospitals. The court of appeals' decision in that regard is consistent with this Court's holding in *Alexander* v. *Choate, supra.*

Cautioning against an overexpansive reading of section 504, the Court held that the statute was not violated by a state's reduction of paid Medicaid days, even though that reduction might result in a failure to provide handicapped persons with "adequate health care." 105 S. Ct. at 722. The Court therefore held that "Section 504 does not require the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs." Section 504 therefore guarantees no more than access to the medical decision-making process. "The Act does not, however, guarantee the handicapped equal results . . . ." *Id.; see Southeastern Community College* v. *Davis, supra.*

The court of appeals in *University Hospital* was of the same view, holding that Congress' "primary concern" with regard to section 504 was that the handicapped be afforded *"access* to federally-funded programs and activities." 729 F.2d at 159 (emphasis supplied). *See Lunceford* v. *District of Columbia Board of Education,* 745 F.2d 1577 (D.C. Cir. 1984); *Plummer by Plummer* v. *Branstad,* 731 F.2d 574 (8th Cir. 1984); *Duquette by and Through Duquette* v. *Dupuis,* 582 F. Supp. 1365 (D. N.H. 1984); *Doe* v. *Colautti,* 545 F. Supp. 621 (E.D. Pa., 1978), *aff'd,* 592 F.2d 704 (3d Cir. 1979). Similarly, in *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F.2d 959 (4th Cir. 1963), *cert. denied,* 376 U.S.

Hospital, "that congress never contemplated that section 504 would apply to treatment decisions of this nature." 729 F.2d at 157. Although the word "health care" was introduced into the statutory language with the 1977 amendments, at no time in any legislative history is the term referred to in any context other than that concerning access.

Congress clearly intended that Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, upon which section 504 was patterned, would eliminate the then-statutorily-permitted "separate-but-equal" racial segregation in the admissions policies of federally-assisted hospitals.[33] However, despite a few oblique references to health and medical treatment, the legislative histories of both the Humphrey/Vanik proposal to amend Title VI to cover the handicapped and the Rehabilitation Act of 1973 strongly support the conclusion that those bills essentially were addressed to educational, vocational rehabilitation, and employment opportunities for handicapped individuals.

It should be noted that President Nixon's vetoes of the earlier versions of the Rehabilitation Act were based in part on his concern that they would improperly require the provision of medical services, and it is significant that Congress receded on this issue. Furthermore, when Congress in the 1974 Amendments to the Rehabilitation Act subsequently broadened the definition of "handicapped individual" and stated its intention that section 504 should apply to discrimination against the handicapped with regard to, *inter alia*, "health services," the legislative history of those amendments is confined to the matter of denial of *admission* to Federally-assisted health care institutions and Congress neither stated nor suggested that Section 504 has any applicability to medical treatment decision-making.

---

938 (1964), a case which figured prominently in the legislative history of Title VI, neither the plaintiffs nor the court asserted that any remedy other than the elimination of barriers to equal access was appropriate or necessary.

[33] *See* 110 Cong. Rec. 6543 (Humphrey), *quoting Simkins* v. *Moses H. Cone Memorial Hospital, supra*, 323 F.2d at 970 n. 23. *See also* 110 Cong. Rec. 6050 (Javits), 7061-62 (Pastore).

Finally, Congress' enactment of the 1978 Amendments did not, as petitioner contends, constitute a general endorsement of the 1977 Department of Health, Education and Welfare ("DHEW") regulations implementing section 504[34] which applied to the provision of "health services or benefits" (45 C.F.R. §§ 84.51-84.53) and which, in an appendix, addressed the provision of "medical treatment" (45 C.F.R. Part 84, App. A, ¶ 36). As the legislative history to the 1978 Amendments to the Rehabilitation Act makes clear, the only DHEW regulations "codified" by the passage of those Amendments were the procedural regulations governing *enforcement* of rights guaranteed by section 504 which included no more than *access* to health-care services.

1. The Humphrey/Percy/Vanik proposal to amend Title VI.

Subsequent to the enactment of Title VI, Senators Percy and Humphrey and Representative Vanik proposed an amendment to Title VI which would have prohibited discrimination against the handicapped in Federally-assisted programs and activities. This amendment was the ancestor of section 504. *See Alexander* v. *Choate, supra,* 105 S. Ct. at 718, n. 13. Petitioner, quoting out of context certain statements by Senator Humphrey and Representative Vanik in reference to handicapped children and health,[35] suggests that such statements show that the intent "carried forward" into section 504 included an intent to address the medical treatment of seriously-ill infants and that the tenor of such statements "strongly supports" the DHHS regulations concerning such treatment. The full text of the quoted remarks contradicts petitioner's opinion.

The fact that Senator Humphrey and Representative Vanik were in fact addressing no more than adequate education, training, and facilities for handicapped individuals capable of being trained to help themselves, rather than medical treatment (as petitioner claims), is revealed by

---

[34] 45 C.F.R. Part 84 (1977).

[35] Brief for Petitioner at 33-34 n. 21.

both the context of the referenced statements [36] and the portions the petitioner omitted therefrom.[37] Similarly, when Senator Humphrey listed "certain examples documenting the need for this legislation," all of his examples concerned *educational opportunities* for handicapped children. *Id.* at

---

[36] Thus, the central theme of Representative Vanik's discussion of "babies . . . born with defects" [117 Cong. Rec. 45974 (1971)] was that "[e]ducation and vocation training is perhaps the great equalizer of employment opportunity in that it provides the individual with the most basic tools of any trade." *Id.* And Mr. Vanik concluded by stating that his "proposed legislation will ensure *equal educational and employment opportunities* for the handicapped, by making discrimination illegal in Federally-assisted programs and activities." *Id.* at 45975, emphasis supplied. Furthermore, when Senator Humphrey, on behalf of himself and Senator Percy, introduced his bill (S. 3044) "which has been introduced jointly in the other body by Representative Charles A. Vanik of Ohio as H.R. 12154" (118 Cong. Rec. 526 (1972)), he similarly emphasized his concern with providing special classes and programs for handicapped children, vocational training and similar programs for handicapped persons generally, and with removing the barriers to employment and independent living for the handicapped. *Id.* at 525.

[37] The italicized portions of the statement set forth below indicate the pertinent omissions from the quotation of Senator Humphrey's remarks set forth in the Brief for Petitioner at 33:

> These people have the right to live, to work to the best of their ability —to know the dignity to which every human being is entitled. *But too often we keep children, who we regard as "different" or a "disturbing influence," out of our schools and community activities altogether, rather than help them develop their abilities in special classes and programs. Millions of young persons and adults who want to learn a trade, work like other people, and establish their self-worth through a paycheck, are barred from our vocational training programs and from countless jobs they could perform well . . . . Where is the cost-effectiveness of consigning them to public assistance or "terminal" care in an institution?*
>
> *These are people who can and must be helped to help themselves. that this is their constitutional right, is clearly affirmed in a number of recent decisions in various judicial jurisdictions.* Every child—gifted, normal, and handicapped—has a fundamental right to educational opportunity and a right to health. *And we know, for example, that more than one-third of the 6 million persons who are actually retarded today are capable of earning a living and being self-supporting productive members of the community if adequate training and residential facilities are provided for them.*

118 Cong. Rec. 523 (1972), emphasis supplied.

525-26.[38] He nowhere suggested a Federal role concerning medical treatment decision-making with regard to the handicapped. Accordingly, petitioner's suggestion that Senator Humphrey and Representative Vanik intended that the nondiscrimination provisions apply to treatment decisions is unsupportable.

In the Brief Amici Curiae of the American Coalition of Citizens with Disabilities, *et al.* ("ACCD") at 25-26, ACCD argues that Senate Concurrent Resolution 52, 117 Cong. Rec. 42294 (1971), which "call[ed] for a declaration of rights for the mentally and physically handicapped" (*see* 118 Cong. Rec. 11789 (1972) (remarks of Sen. Percy), demonstrates Congress' intent to address medical treatment of the handicapped in the bills at issue.[39] Contrary to ACCD's contention, however, there is no allusion in the legislative history to the Concurrent Resolution's "recognition" of a "right" to medical care, and, as previously discussed, that

---

[38] Likewise, when Senator Humphrey subsequently introduced voluminous supporting materials (newspaper articles, editorials, etc.) into the record, the subject of all of these materials was the inadequate education and training programs for handicapped children and adults and the failure of many institutions to provide adequate training or safe and healthful conditions. *See* 118 Cong. Rec. 9495-9501.

[39] In a statement by Senator Percy (the co-sponsor of S. 3044) inserted into the record by Senator Humphrey, Senator Percy referred to Senate Concurrent Resolution 52. 118 Cong. Rec. 526 (1972). Among the many "rights" endorsed in the Concurrent Resolution was "the right to proper medical care and physical restoration and to such education, training, rehabilitation, and guidance as will enable that person to develop his ability and potential to the fullest possible extent, no matter how severe his or her degree of disability." 117 Cong. Rec. 42294. Without referring to medical care, Senator Percy stated that S. 3044 "would realize this commitment [*i.e.*, that of the Concurrent Resolution], guaranteeing the handicapped equal opportunity to education, job training, productive work, due process of law, a decent standard of living, and protection from exploitation, abuse and degradation." 118 Cong. Rec. 526.

Thereafter, in April of 1972, when Senators Percy and Humphrey introduced the bill to amend Title VI to bar discrimination on the basis of handicap in employment, Senator Percy stated that "[w]hile that the Concurrent Resolution was not meant to solve the problems that plague our handicapped citizens, it was an attempt to draw attention to their plight and encourage the solution of their problems." 118 Cong. Rec. 11789.

issue was raised nowhere in the discussion of the proposed amendments. Equally importantly, many other "rights" listed in the Concurrent Resolution clearly are irrelevant to those bills or to section 504.[40] Accordingly, it cannot be asserted that Congress considered or intended to codify a "right" to medical treatment and ACCD's contention is "bootstrapping" in the extreme.

2. The Rehabilitation Act of 1973.

The Rehabilitation Act of *1972,* passed by Congress in that year, was twice vetoed by President Nixon, and the Senate failed to override those vetoes. President Nixon's veto was motivated in part by his concern that certain sections of the legislation "would divert the Vocational Rehabilitation program from its original purposes by requiring that it provide new medical services . . . , a concern . . . that can be approached more effectively within the Medicare program, as existing legislation already provides." 119 Cong. Rec. 24570 (1973) (second veto message). Significantly, as the court observed in *University Hospital,* Congress "was forced to back down" on this issue, and "authorized research projects instead of categorical [treatment] programs . . . ." 729 F.2d at 157.

The meaning and scope of the non-discrimination provision received scant attention during the passage of the 1972 and 1973 Rehabilitation Acts, and most references to the provision simply quoted or restated its terms.[41] The

---

[40] *E.g.,* "a right to economic security and to a decent standard of living," a "right to a qualified financial or legal guardian," "a right to live with his or her own family or with foster parents, and to participate with all aspects of community life, and to be provided with appropriate leisure time activities." 117 Cong. Rec. 42294.

[41] *See* 117 Cong. Rec. 45945 (1971); 118 Cong. Rec. 525, 526, 8399, 8894, 11797, 16371, 30681, 30682, 30683, 32280, 32281, 32282, 32294, 32302, 32310, 35155, 35163, 35837 (1972); 119 Cong. Rec. 65, 5862, 5873, 5880, 5915, 6145, 7114, 7136, 7153, 18127, 24562, 24569, 24571, 24580-81, 24586-89, 29628, 29633 (1973), *See also University Hospital,* 729 F.2d at 157 ("this provision . . . was never a matter of controversy. Consequently, there is little discussion of it in the volumes of legislative history that were generated.").

legislative history of the 1973 Act, for example, describes Section 504 as "a provision proclaiming a policy of nondiscrimination against otherwise qualified handicapped individuals with respect to participation and/or access to any program which is in receipt of Federal financial assistance." S. Rep. No. 318, 93rd Cong., 1st Sess. 50, *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2123.[42] Nowhere in the legislative history of the 1972 and 1973 Rehabilitation Acts is there any suggestion that the nondiscrimination provision would address medical treatment decision-making.[43]

3. Rehabilitation Act Amendments of 1974

As the court emphasized in *University Hospital*, "[t]he post-enactment legislative history also indicates both that congress was primarily concerned with affording the handicapped access to federally-funded programs and activities, and that congress never envisioned that HEW (or HHS) would attempt to apply section 504 to treatment decisions." 729 F.2d at 159.[44]

---

[42] Similarly, the section-by-section analysis simply states that section 504 "prohibits discrimination, exclusion or denial of benefits to otherwise qualified handicapped individuals by any program or activity receiving Federal financial assistance." 1973 U.S. Code Cong. & Ad. News at 2143. *See also* 119 Cong. Rec. 5882 (1973) (remarks of Sen. Alan Cranston); 119 Cong. Rec. 24586-87 (remarks of Sen. Jennings Randolph).

[43] Particularly misleading in this regard is petitioner's claim (Brief for Petitioner at 34, n. 21) that Representative Vanik's post-enactment references to the ancient Spartans "touch on" the medical treatment of seriously-ill infants. On the contrary, Representative Vanik's comments referred solely to the elimination from the final bill of his proposal for educational assistance for handicapped children, and not to medical treatment of any handicapped person. (119 Cong. Rec. 18137).

[44] Thus, although it is emphasized in the legislative history of the Rehabilitation Act Amendments of 1974, S. Rep. No. 1297, 93d Cong., 2d Sess. 37-41, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388-91, that Congress "clearly" intended that section 504 not be limited to employment and vocational rehabilitation issues, and that such issues are "irrelevant to many forms of potential discrimination covered by section 504" (*id.* at 6388), the Senate Report contains no definition or discussion of "health services" except for a hypothetical example of "handicapped persons who may be denied admission to Federally-assisted nursing homes on the basis

4. Rehabilitation, Comprehensive Services and Developmental Disabilities Act Of 1978 (1978 Amendments To Rehabilitation Act).

Petitioner contends that DHEW's 1977 regulations (45 C.F.R. Pt. 84) show a "firmly established" administrative application of Section 504 to medical treatment decisions (Brief for Petitioner at 42), and that Congress' 1978 amendments to the Rehabilitation Act constituted "a general endorsement of" DHEW's 1977 regulations. Brief for Petitioner at 42, *citing* S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978).

Congress in 1978 added Section 505(a)(2) of the Act (92 Stat. 2984) to provide that "[t]he remedies, procedures, and rights set forth in Title VI . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under Section [504]." This new subsection was addressed to the procedures, remedies, and rights pertaining to *enforcement* of section 504, rather than to the substantive rights protected by section 504,[45] as this Court

---

of their handicap" (*id.* at 6389), an issue of *access* to services. See n. 32, *supra*. Accordingly, while Congress apparently was concerned that handicapped persons might be denied access to Federally-assisted medical facilities, the legislators did not consider or address medical treatment decisions within such facilities.

[45] The Senate Report stated the committee's understanding that "the regulations promulgated by [DHEW] with respect to procedures, remedies, and rights under Section 504 conform with those promulgated under Title VI. Thus, this amendment [Section 504(a)(2)] codifies existing practice as a specific statutory requirement." S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978). The DHEW Section 504 regulation [45 C.F.R. § 84.61] which "conforms" to the regulations promulgated under Title VI in fact simply *incorporated* the enforcement rights and procedures provided in DHEW's Title VI regulations. As stated in 45 C.F.R. § 84.61, "[t]he procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 80.6 through 80.10 and Part 81 of this Title." The Title VI regulations thus incorporated into the Section 504 enforcement provision include provisions governing: compliance information (§ 80.6); conduct of investigations (§ 80.7); procedures for effecting compliance (§ 80.8); hearings (§ 80.9); decisions and notices (§ 80.10); and "Practice and Procedure for Hearings Under Part 80 of this Title" (Part 81).

recognized in *Consolidated Rail Corp.* v. *Darrone,* 104 S. Ct. at 1255. Accordingly, and directly contrary to the petitioner's claim that the Court has understood this action by Congress in 1978 [*i.e.*, enactment of Section 505(a)(2)] "to constitute a general endorsement of HEW's section 504 regulations" (Brief for Petitioner at 42), Congress made no such general endorsement and neither considered nor addressed HEW's suggestion that the reach of section 504 might extend to medical treatment.[46]

Accordingly, as the court correctly held in *University Hospital,* "[t]he legislative history . . . indicates that Congress never contemplated that section 504 would apply to treatment decisions of this nature." 729 F.2d at 157.

C. DHHS' Current Interpretation Of Section 504 Should Be Accorded No Deference In Evaluating The Statute And Its History Because The Agency's View Is Neither Long Nor Consistently Held.

While courts often defer to an agency's interpretation of the statute it administers, "[i]n order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose." *Morton* v. *Ruiz,* 415 U.S. 199, 237 (1974) (citations omitted). In addition, to be entitled to any weight, such agency interpretations must also be *consistently held. United States* v. *National Associ-*

---

[46] This suggestion appeared in an appendix to its regulation concerning non-discrimination in the provision of Federally-assisted health services. *See* 45 C.F.R. Pt. 84, App. A, ¶ 36. There is likewise no suggestion that Congress, in enacting Section 505(a)(2), considered or addressed DHEW's regulations concerning the treatment of alcoholics and drug addicts. Thus, although 45 C.F.R. § 84.53 provides that Federally-assisted medical facilities "may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism," that regulation is based upon statutory authority other than Section 504 [42 U.S.C. (Supp. I) 290dd-2(a)]. And although both the Attorney General and the Secretary have expressed the opinion that Section 504 would impose a similar requirement (*see* 43 Op. Att'y Gen. No. 12 (1977) at 10; 45 C.F.R. Pt. 84, App. A, ¶ 37), it cannot be said that Congress in 1978 considered DHEW's regulations or observations concerning the treatment of alcoholics and drug addicts.

ation of Securities Dealers, Inc., 422 U.S. 694, 718 (1975); *Morton* v. *Ruiz*, 415 U.S. at 237; *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972). Petitioner's recent assertion of section 504 authority regarding seriously-ill infants does not meet these standards.

Petitioner contends that the invalidated DHHS regulation governing medical treatment of seriously-ill infants (45 C.F.R. § 84.55, J.A. 111-126) is consistent with prior regulations promulgated by the Department to implement section 504, and that the "Baby Doe" regulation simply articulates (albeit in an expanded form) the manner in which DHHS previously had interpreted and enforced section 504 and the regulations implementing that statute. Brief for Petitioner at 2-3, 39-42, 40-46.

Contrary to these contentions, however, the Department's regulations implementing section 504 from the outset have been addressed to insuring that handicapped persons have access to federally-assisted health institutions, and were promulgated upon the recognition of important differences between handicap and race which make it impossible to apply the same approach to eliminating discrimination under section 504 and Title VI. As previously referenced, the Secretary in 1976 stated that "[h]andicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination." 41 Fed. Reg. 20296 (1976).

Furthermore, on the only occasion (prior to 1982) when the Department considered whether it possessed authority under section 504 to promulgate regulations addressing a patient's right to medical treatment, the Secretary specifically concluded that DHHS did not possess such authority. *See* 41 Fed. Reg. 20296-97, 41 Fed. Reg. 29559 (1976). Accordingly, as the court concluded in *University Hospital*:

> [T]he regulatory history of section 504 is inconclusive. HHS's current view of the scope of the statute is flatly at odds with the position originally taken by HEW . . . . In determining whether Congress intended section 504 to apply to treatment decisions involving

> defective newborn infants, we therefore lack the benefit of an administering agency's longstanding, consistent interpretation to which we otherwise might have looked for guidance.

729 F.2d at 154, citations omitted.[47]

II. In The Absence Of Any Clear Statement Of Congressional Intent, Congress Cannot Be Presumed To Have Superseded The Traditional Role Of The States In Dealing With Child Protection and Medical Treatment.

Virtually all of the *amici curiae* supporting petitioner ask this Court, on alleged public policy grounds, to imply that section 504 reaches medical treatment decisions affecting seriously-ill infants.[48] However, federal entrance into the field of child protection, which traditionally has been left to the regulation of the States, may not be presumed in the absence of an unequivocal manifestation of congressional intent. Not only has Congress expressed no such intent, it recently reaffirmed the traditional role of the States through the Child Abuse Amendments of 1984. Seriously-ill infants are, therefore, not without significant protection. The well-entrenched state mechanisms are working, and coupled with advances in medical education and resource deployment, the needs of seriously-ill infants are demonstrably being met by hospitals and by physicians.

A. The Federal Government Lacks Authority Under Section 504 To Supersede The Traditional Role Of The States In Dealing With The Medical Treatment Of Seriously-Ill Infants.

In the absence of a clear congressional mandate, long-established precedent precludes implication of federal entry into a field traditionally occupied by the States. In *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940), for example,

---

[47] Petitioner cites a single instance in which in 1980, before the regulatory effort at issue, DHHS asserted section 504 authority to investigate the medical treatment of an infant in a hospital. Brief for Petitioner at 44 n. 35. However, rather than demonstrating any such authority, the hospital did no more than to fulfill its state law obligations.

[48] *See, e.g.*, Brief *Amici Curiae* of the American Coalition of Citizens With Disabilities, *et al.*, at 4-5.

the Court emphasized that "[t]he maintenance in our federal system of a proper distribution between state and national governments of policy authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress." 310 U.S. at 513 (1940). *See also Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977), *quoting United States* v. *Bass*, 404 U.S. 336, 349 (1971); *FTC* v. *Bunte Bros., Inc.*, 312 U.S. 349, 354-55 (1941). Accordingly, the Court "in construing legislation . . . has disfavored in-roads by implication" upon the States' traditional police powers. *Palmer* v. *Commonwealth of Massachusetts*, 308 U.S. 79, 84 (1939).

Petitioner claims that section 504 authorizes DHHS to investigate and intervene in treatment decisions concerning seriously-ill infants, even if relevant state agencies are taking or have taken an active role in such cases. *See* 48 Fed. Reg. 30849 (1983). However, while "state statutes and regulations may be superseded by validly enacted regulations of federal agencies . . . ," *Katharine Gibbs School, Inc.* v. *FTC*, 612 F.2d 658, 667 (2d Cir. 1979), it is also the case that "[w]here the field which Congress is said to have preempted has been traditionally occupied by the States, . . . 'we start with the assumption that the historic police powers of the States were not to be superseded unless that was the clear and manifest purpose of Congress.' " *Jones* v. *Rath Packing Co., supra*, 430 U.S. at 525, *quoting Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (other citations omitted).

No party disputes that all of the States traditionally and actively have occupied the field of protection of children against abuse and neglect, and that the State agencies and mechanisms that deal with those matters have authority to take action where necessary medical care is being denied. On the other hand, there is nothing that can be called a clear statement of congressional intention—as to section 504 or any other federal enactment—for the federal government to enter the field in any way other than to assure that the State agencies are accomplishing their purposes.

The protection of children is, of course, a traditional and fundamental power of the States acting in their role as *parens patriae*. *See Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158, 166-67 (1944). Even in the absence of statutory authority, a state court of equity "has both the power and responsibility to care for and protect all those persons who, by virtue of some legal disability, are unable to protect themselves." *Custody of a Minor*, 375 Mass. 733, 379 N.E. 2d 1053, 1060 (Mass. 1978).[49]

Furthermore, every state (including the District of Columbia) has enacted legislation making child abuse and neglect a crime and imposing on physicians and hospital personnel requirements of mandatory reporting of suspected instances of such abuse or neglect.[50] Forty-eight states and the District of Columbia include the failure to provide medical care specifically within the scope of proscribed conduct,[51] and the remaining two states have interpreted their statutes [52] as applicable to cases involving

---

[49] In appropriate circumstances, the States may exercise their power to order medical treatment of a minor despite parental objection. *See, e.g., Wright* v. *DeWitt School Dist.*, 238 Ark. 906, 385 S.W.2d 644 (1965); *In re Phillip B.*, 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (1979), *cert. denied*, 445 U.S. 949 (1980); *In re Ivey*, 319 So. 2d 53 (Fla. Dist. Ct. App. 1975); *Jefferson* v. *Griffin Spalding County Hosp. Auth.*, 247 Ga. 86, 274 S.E.2d 457 (1981); *People ex rel. Wallace* v. *Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952), *cert. denied*, 344 U.S. 834 (1952); *In re P.V.W.*, 424 So. 2d 1015 (La. 1982); *Custody of a Minor*, 375 Mass. 733, 379 N.E.2d 1053 (1978); *In re Brooklyn Hosp.*, 45 Misc. 2d 914, 258 N.Y.S.2d 621 (N.Y. Sup. Ct. 1965); *In re Cicero*, 101 Misc. 2d 699, 421 N.Y.S.2d 965 (N.Y. Sup. Ct. 1979); *In re Sampson*, 65 Misc. 2d 658, 317 N.Y.S.2d 641 (N.Y. Fam. Ct. 1970); *In re Clark*, 185 N.E.2d 128 (Ohio 1962); *In re Hudson*, 13 Wash. 2d 673, 126 P.2d 765 (1942).

[50] These statutory provisions are listed in the Appendix to this Brief, at 1a-2a.

[51] These statutory provisions are listed in the Appendix to this Brief, at 3a.

[52] Neb. Rev. Stat. § 43-247(1)(3)(a) (1984); N.D. Cent. Code §§ 27-20-02(5) (1981).

failure to provide medical care.[53] Finally, where an investigation reveals that a child is being mistreated, state law authorizes the appropriate agency to initiate proceedings to bring the child within the jurisdiction of a court, take the child into protective custody, and, where appropriate, initiate criminal prosecutions.[54]

Given the longstanding involvement of the States in protecting children, and the comprehensiveness of the statutory approaches to that goal, and given the utter lack of anything approaching a clear pronouncement that Congress intended that the federal government do anything other than support the States, the Court should not allow DHHS to regulate by petitioner's fiat.

B. In The Child Abuse Amendments, Congress Built Upon Existing State Protective Mechanisms In Order To Reaffirm Both The Rights Of Seriously-Ill Infants And The Need To Avoid Unreasonable Governmental Intervention Into Parental Responsibilities And The Practice Of Medicine.

When Congress recently addressed the issue of medical treatment decisions concerning seriously-ill infants in the Child Abuse Amendments of 1984, it did so in a manner recognizing and amplifying the States' traditional authority in the area and assigning the federal government to do no more than to assure that the States would carry out their responsibilities.[55] This approach was selected instead of alternatives including amendment of section 504 to am-

---

[53] *See, e.g., In re Interest of M.W., et al.*, 217 Neb. 325, 348 N.W.2d 861 (1984) (failure, *inter alia*, to administer medication, bring children to doctor); *In the Interest of R.W.B.*, 241 N.W.2d 546 (N.D. 1976) (failure, *inter alia*, to secure proper medical care for child).

[54] *See, e.g., State* v. *Clark*, 5 Conn. Cir. Ct. 699, 261 A.2d 294 (1969); *Bradley* v. *State*, 79 Fla. 651, 84 So. 677 (1920); *Eaglen* v. *State*, 249 Ind. 144, 231 N.E.2d 147 (1967); *Commonwealth* v. *Edelin*, 371 Mass. 497, 359 N.E.2d 4 (1976); *State* v. *Staples*, 126 Minn. 396, 148 N.W. 283 (1914); *Matthews* v. *State*, 240 Miss. 189, 126 So. 2d 245 (1961); *State* v. *Stehr*, 92 Neb. 755, 139 N.W. 676 (1913), *aff'd on rehearing*, 94 Neb. 151, 142 N.W. 670 (1913).

[55] See pp. 46-47, *infra*.

plify its coverage to medical treatment decisions and to seriously-ill infants.[56]

When it enacted the Child Abuse Amendments, Congress was fully aware of the courts' uniform refusals to hold that section 504 authorized federal intervention in medical treatment decisions. *See* S. Rep. No. 246, 98th Cong., 2d Sess. 5-8 (1984). Although there was considerable attention given to this issue, Congress decided not to resolve the question but implicitly, through its neutrality language,[57] to leave it to the courts to do so in pending or future cases. This congressional forebearance, in recognition of an intense dispute over the issue of section 504 jurisdiction, offers convincing evidence that a majority in both Houses recognized at least that Congress had not manifested a clear intention for the federal government to get into a field so heavily occupied by the States. This Court, therefore, should not hold that Congress intended to legislate more broadly than its expressions in either the Child Abuse Amendments or the legislative history of section 504.

In their Brief *Amicus Curiae*, Senator Hatch and Representative Murphy incorrectly argue that AHA contends that the Child Abuse Amendments demonstrate "congressional hostility toward protection of disabled infants under section 504." Brief Amicus Curiae of Hon. Orrin G. Hatch and Austin J. Murphy, Members of Congress, In Support of Petitioner at 8-9. To the contrary, Congress explicitly stated its neutrality on the point. Congress did not, as Senator Hatch and Congressman Murphy imply, express support for DHHS' section 504 regulation.

---

[56] The courts had suggested that Congress might do this. *United States* v. *University Hospital*, *supra*, 729 F.2d at 161, *American Academy of Pediatrics* v. *Heckler*, *supra*, 561 F. Supp. at 401-402.

[57] Sec. 127(a) of the Child Abuse Amendments (98 Stat. 1754) provides:

> No provision of this Act or any amendment made by this Act is intended to affect any right or protection under section 504 of the Rehabilitation Act of 1973.

The point is that Congress had the opportunity to state that section 504, in amended form or otherwise, covered the medical treatment of seriously-ill infants, but it chose not to do so. Instead, Congress, with the active participation of AHA and others in the hearings and conference process, did no more than to act to ensure state compliance.

In the preface to its final rule implementing the Child Abuse Amendments, 45 C.F.R. Part 1340, as added by 50 Fed. Reg. 14887-92 (April 15, 1985), DHHS conceded that the Amendments reflect Congress' clear intent to "build upon existing mechanisms at the state level" (50 Fed. Reg. 14881) in developing "an effective and workable program to assure the provision of appropriate medical care to disabled infants." 50 Fed. Reg. 14879. As the Agency also recognized, the statute represents a "careful balance between the need to establish effective protection of the rights of disabled infants and the need to avoid unreasonable government intervention into the practice of medicine and parental responsibilities." *Id.*

Finally, DHHS recognized that the States' role rendered unnecessary a confidential 24-hour federal telephone hotline specified in DHHS' invalidated section 504 regulation (45 C.F.R. § 84.55(b), 49 Fed. Reg. 1651, J.A. 112-114) for reporting the suspected withholding of treatment from seriously-ill infants "[b]ecause the Act so clearly places responsibility for implementation on State CPS [Child Protective Service] agencies . . . ." 50 Fed. Reg. at 14884.

Although the legislative history of section 504 does not show that Congress intended that statute to apply to the medical treatment of seriously-ill infants, and despite the Agency's recognition that the Child Abuse Amendments represent a balanced and meticulously crafted congressional determination of the most appropriate allocation of authority for addressing such issues, petitioner and others now ask the Court to hold that section 504 provides implicit authorization for DHHS to assume the role Congress designated for the States in the Child Abuse Amendments. Not only is such a federal role without support in the language and history of section 504, it is unnecessary as well.

C. There Is No Need For Federal Involvement In Medical Treatment Decision-Making Concerning Seriously-Ill Infants.

Although petitioner and her supporters argue that the withholding of necessary treatment from newborns is occurring frequently throughout the country, the facts do not support this assessment. For example, although the government's energetic investigation of hotline tips and complaints under the interim final rule resulted in considerable disruption and adversely affected patient care in subject hospitals, *none* of those investigations—49 in all—resulted in a finding of "discrimination," as petitioner uses the term. *See* 49 Fed. Reg. at 1649. Furthermore, even the Surgeon General of the United States, and other strong supporters of DHHS' section 504 regulation, concede that medical education has improved, resources are better developed and deployed, and relatively few inappropriate treatment decisions are made. *See Protection of Handicapped Newborns: Hearings Before the United States Commission on Civil Rights* (1985), at 51-52 (Testimony of Dr. C. Everett Koop).

A similar conclusion was reached by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (the "Commission"). As the Commission found, "treatments are rarely withheld when there is a medical consensus that they would provide a net benefit to a child." President's Commission Report at 217. Furthermore, having stated the principle that "permanent handicaps justify a decision not to provide life-sustaining treatment only when they are so severe that continued existence would not be a net benefit to the infant" (*id.* at 218), the Commission emphasized that the available studies and testimony before the Commission show that "decision-making about seriously-ill newborns . . . usually adheres to the precepts outlined in this chapter." *Id.* at 223, n. omitted.

> Of the more than three million babies born each year in the United States, tens of thousands are born pre-

> maturely or with congenital anomalies and many of them would die quickly if not treated. Yet it is rare for treatment not to be provided when it is predicted to provide a means of remedying the medical problem: the cases when approval for such treatment is denied are few enough to be newsworthy. While very disturbing, they may be inevitable in a society that treasures personal and familial autonomy. Moreover, there is little reason to think that greater control by state officials, in the name of protecting the helpless, would actually be warranted only if it clearly saved more lives. Furthermore, such steps would raise problems of governmental intrusion into private matters in many cases where no better decision could be made.

Id. at 209 n. 51.

In summary, in the Child Abuse Amendments, the only federal statute specifically addressing the medical treatment of seriously-ill infants, Congress recognized and built upon the States' traditional functions and comprehensive remedies to protect such infants' interests and to avoid unreasonable governmental intrusion into the practice of medicine. In contrast, DHHS intervention in this area under the alleged authority of section 504 is unauthorized and unnecessary in light of the array of broad investigative, protective, remedial, and prosecutorial powers of the States and the evidence demonstrating that hospitals and physicians are acting responsibly.

CONCLUSION

The American Hospital Association and other responsible members of the health services community recognize that the care of seriously-ill infants is a matter of the greatest public import. AHA has participated actively in helping to assure that the needs of such infants will be met, drawing upon the resources of the traditional parent/physician relationship, education and review capabilities of hospitals, and the authority of the States to act in egregious cases. The fact that the interests of seriously-ill infants are important cannot, however, justify petitioner's unprecedented intrusion into medical treatment decision-mak-

ing under the purported authority of section 504 of the Rehabilitation Act of 1973.

Respondents submit that the plain meaning of the terms of section 504 are inconsistent with petitioner's invalidated regulatory effort, and that Congress has never stated a clear intent for the federal government to have such authority. For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Of Counsel:

RICHARD L. EPSTEIN
ROBERT W. MCCANN
MARY L. AHERN
American Hospital Association
840 N. Lake Shore Drive
Chicago, IL 60611

STUART M. GERSON
(*Counsel of Record*)
WILLIAM G. KOPIT
DAVID H. LARRY
1140 19th Street, N.W., Suite 900
Washington, D.C. 20036
(202) 861-0900
EPSTEIN BECKER BORSODY & GREEN, P.C.

Attorneys for the Respondents American Hospital Association, et al.

Nov. 4, 1985

APPENDIX

APPENDIX

STATE STATUTORY PROVISIONS REQUIRING REPORTING OF SUSPECTED CHILD ABUSE OR NEGLECT

Ala. Code §§ 26-14-1 - 26-14-13 (1977 & Supp. 1985); Alaska Stat. §§ 47.17.010 - 47.17.070 (1984 & Supp. 1985); Ariz. Rev. Stat. Ann. § 13-3620, § 36-2282 (Supp. 1984-85); Ark. Stat. Ann. §§ 42-807 - 42-819 (1977 & Supp. 1985); Cal. Penal Code §§ 11165-11174 (Deering Supp. 1985); Colo. Rev. Stat. §§ 19-10-101 - 19-10-116 (1978 & Supp. 1984); Conn. Gen. Stat. Ann. §§ 17-38-17-38f (West 1975 & Supp. 1985); Del. Code Ann. tit. 16, §§ 901-909 (1983); D.C. Code Ann. §§ 6-2101-2107 (1981); Fla. Stat. Ann. §§ 415.502-415.514 (West Supp. 1985); Ga. Code Ann. § 19-7-5 (1982); Hawaii Rev. Stat. §§ 350-1 - 350-7 (1976 & Supp. 1984); Idaho Code §§ 16-1601 - 16-1629 (1979 & Supp. 1985); Ill. Ann. Stat. ch. 23, §§ 2051-2061.7 (Smith-Hurd Supp. 1985); Ind. Code Ann. §§ 31-6-11-1 - 31-6-11-22 (West 1979 & Supp. 1985); Iowa Code Ann. §§ 232.67-232.77 (West 1985); Kan. Stat. Ann. §§ 38-716 - 38-724 (1981); Ky. Rev. Stat. Ann. § 199.335 (Baldwin Supp. 1984); La. Rev. Stat. Ann. § 14:403, §§ 40:1299.36.1-40:1299.36.3 (West 1974 & Supp. 1985); Me. Rev. Stat. Ann. tit. 22, §§ 4011-4017 (Supp. 1984-85); Md. Fam. Law Code Ann. §§ 5-701 - 5-710, §§ 5-901 - 5-912 (1984 & Supp. 1985); Mass. Ann. Laws ch. 119, §§ 51A-51G (1975 & Supp. 1985); Mich. Stat. Ann. §§ 25.248(1)-25.248(16) (Callaghan 1984); Minn. Stat. Ann. § 626.556 (1983 & Supp. 1985); Miss. Code Ann. §§ 43-21-353 - 43-21-355 (Supp. 1984); Mo. Ann. Stat. §§ 210.110 - 210.174 (Vernon Supp. 1985); Mont. Code Ann. §§ 41-3-201 - 41-3-208 (1983); Neb. Rev. Stat. §§ 28-711 - 28-727 (1979 & Supp. 1984); Nev. Rev. Stat. §§ 200.501 - 200.5085 (1981 & Supp. 1983 & Supp. 1984); N.H. Rev. Stat. Ann. §§ 169-C:29 - 169-C:40 (Supp. 1983); N.J. Stat. Ann. §§ 9:6-8.8-9:6-8:20 (West 1976 & Supp. 1985); N.M. Stat. Ann. §§ 32-1-13 - 32-1-16 (Supp. 1985); N.Y. Soc. Serv. Law §§ 411-418 (McKinney 1983 & Supp. 1984-85 & Supp. July 1985); N.C. Gen. Stat. §§ 7A-542 - 7A-552 (1981 & Supp. 1983); N.D. Cent. Code §§ 50-25.1-01 - 50-25.1-13 (1981 & Supp. 1985); Ohio Rev. Code Ann. § 2151.42.1 (Page Supp. 1983); Okla. Stat. Ann. tit. 21, §§ 845-848 (West 1983 & Supp. 1984-85); Or. Rev. Stat. §§ 418.740-774 (1983); Pa. Stat. Ann. tit. 11, § 2201-2213 (Purdon Supp. 1985); R.I. Gen. Laws §§ 40-11-1 - 40-11-16 (1984 & Supp. 1984); S.C. Code Ann. §§ 20-7-500 - 20-7-560 (1985); S.D. Codified Laws §§ 26-10-1 - 26-10-18 (1984 & Supp. 1985); Tenn. Code Ann. §§ 37-1-401 - 37-1-413 (1984 & Supp. 1985); Tex. Fam. Code Ann. §§ 34.01-34.08 (Vernon 1974 & Supp. 1985); Utah Code Ann. §§ 78-3b-1 - 78-3b-15 (Supp. 1983 & 1985); Vt. Stat. Ann. tit. 33, §§ 681-689 (Supp. 1984); Va. Code §§ 63.

1.248.1-63.1.248.17 (1980 & Supp. 1985); Wash. Rev. Code Ann. §§ 26.44.010-26.44.900 (Supp. 1986); W. Va. Code §§ 49-6A-1 - 49-6A-10 (1980 & Supp. 1985); Wis. Stat. Ann. § 48.981 (Supp. 1985); Wyo. Stat. §§ 14-3-201 - 14-3-215 (1977 & Supp. May 1985).

STATE STATUTORY PROVISIONS INCLUDING FAILURE TO PROVIDE MEDICAL CARE WITHIN PROHIBITION OF CHILD ABUSE OR NEGLECT

Ala. Code § 26-14-1 (1977); Alaska Stat. § 47-10.010(a)(2)(B) (Supp. 1985); Ariz. Rev. Stat. Ann. § 13-3620(A) (Supp. 1984-85); Ark. Stat. Ann. § 42-807(c) (Supp. 1985); Cal. Penal Code § 11165(c)(1) and (2) (West 1985); Colo. Rev. Stat. § 19-1-103(20)(d) (1978); Conn. Gen. Stat. Ann. § 46b-120 (West 1985); Del. Code Ann. tit. 31, § 301 (1975); D.C. Code Ann. § 16-2301(9)(B) (1981); Fla. Stat. Ann. § 39.01 (27) (West Supp. 1985); Ga. Code Ann. § 15-11-2(8)(A) (Supp. 1984); Hawaii Rev. Stat. § 350-4 (1976), § 587-2 ["Guidelines" (19)(A)] (Supp. 1984); Idaho Code § 16-1602(n)(1) (Supp. 1985); Ill. Rev. Stat. ch. 37, § 702-5(c) (Supp. 1985); Ind. Code Ann. § 31-6-4-3(a)(1) (West Supp. 1985); Iowa Code Ann. §§ 232.2.6.e (West 1984); Kan. Stat. Ann. § 38. 722(a) (1981); Ky. Rev. Stat. § 199.011(c) (1985); La. Rev. Stat. Ann. § 14-403(B)(4) (West Supp. 1985); Me. Rev. Stat. Ann. tit. 22, § 4002 (6)(B) (1981); Md. Pub. Safety Code Ann. § 35A (1973), Md. Fam. Law Code § 5-701(g)(2) (1984); Mass. Ann. Laws ch. 273, § 1 (Michie/ Law. Co-op. 1980); Mich. Comp. Laws Ann. § 722.622(c) (West 1984); Minn. Stat. § 626.556(2)(c) (Supp. 1985); Miss. Code Ann. § 43-21-105(1)(i) (1981); Mo. Rev. Stat. § 210.110(5) (1983); Mont. Code Ann. § 10-503 (1983); Nev. Rev. Stat. § 200.5011(1) and (3) (1983); N.H. Rev. Stat. Ann. § 169-C:3(b) and (c) (Supp. 1983); N.J. Rev. Stat. § 9:6-8.9(d) (1976); N.M. Stat. Ann. § 30-6-1(A)(2) (Supp. 1983); N.Y. Soc. Serv. Law § 371.4-a(i)(A) (McKinney 1983); N.C. Gen. Stat. § 7A-517(21) (1981); Ohio Rev. Code Ann. § 2151.03 (Page 1976); Okla. Stat. Ann. tit. 21, § 852 (West 1983); Or. Rev. Stat. § 418.740(1)(b) (1983); Pa. Stat. Ann. tit. 11, § 2203 (Purdon Supp. 1985); R.I. Gen. Laws § 40-11-2(2)(d) (Supp. 1983); S.C. Code Ann. § 20-7-490(c)(3) (Law Co-op. 1983); S.D. Codified Laws Ann. § 26-8-6(4) (1984); Tenn. Code Ann. § 37-1-102(9)(d) (Supp. 1984); Tex. Fam. Code Ann. §§ 12.04 (3), 34.01 (Vernon 1975); Utah Code Ann. § 78-3a-2(17)(c) (Supp. 1983); Vt. Stat. Ann. tit. 33, § 682(3)(c) (1984); Va. Code § 63.1-248.A.2 (1980); Wash. Rev. Code Ann. §§ 26.44.010, 26.44.020(3) and (12) (Supp. 1985); W. Va. Code § 49-1-3(g)(1)(A) (1985); Wis. Stat. Ann. § 48.981(1)(d) (West Supp. 1984-85); Wyo. Stat. § 14-6-201(a)(xvi) (A) (Supp. 1984). With nine exceptions, the foregoing statutes specifically encompass or address parental failure to provide medical or health care. However, the statutes for the nine "non-specific" jurisdictions (Connecticut, District of Columbia, Georgia, Idaho, Massachusetts, New Hampshire, Oregon, Pennsylvania, and Washington) all clearly address denials of medical treatment as a form of abuse or neglect because those statutes provide that provision of treatment by a licensed spiritual practitioner (*e.g.*, Christian Scientist) shall not in itself be deemed abuse or neglect of a child.